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IN THE

Supreme Court of the United States

October Term, 1990

JOE AULSTON and LOLA AULSTON; HOWARD L. BARTLEY and ELSIE BARTLEY; VIRGINIA BASSETT; ROGER A. BIGLER, Trustee; BARBARA BURKE, Trustee for PAUL WILSON Estate;
Petitioners,

(Additional Petitioners are listed inside front cover.)

vs.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; MANUEL LUJAN, JR., in his Official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; CY JAMISON, in his official capacity as Director of the U.S. Bureau of Land Management; H. ROBERT MOORE, in his official capacity as Colorado State Director of the Bureau of Land Management,
Respondents,

and

SHELL WESTERN E & P, Inc.; CONOCO, INC.; VINCENT J. DUNCAN; RAYMOND T. DUNCAN; ELECTRA INVESTMENT; SYNERGY EXPLORATION, CO.; GULF OIL CORP.; MOBIL PRODUCING TEXAS/NEW MEXICO; MCO RESOURCES, INC.; ESTATE OF WALTER DUNCAN; TIDELANDS ENERGY CO.; UNIVERSAL RESOURCES CORP.; LENDON CO.; DUNCAN ENTERPRISES, INC.; JUSTIN R. MEYER; BARBARA L. MEYER; PHILLIPS OIL CO.,
Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GARY LAWSON
357 E. Chicago Avenue
Chicago, Illinois 60611
(312) 503-0306

ROBERT H. BORK
Counsel of Record
1150 17th Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 862-5800

LUKE J. DANIELSON
GERSH & DANIELSON
1775 Sherman Street, Suite 1875
Denver, Colorado 80203
(303) 863-1115

STEPHEN H. MUSE
5919 Winding Ridge
San Antonio, Texas 78239
(512) 655-7559

Attorneys for Petitioners

Batavia Times Publishing Co.
Batavia, New York (716) 344-2000

(Additional Petitioners.)

STANLEY E. BREWER and REGINA BREWER; CHARLES H. BROUGHER and BESSIE C. BROUGHER; RUSSELL D. BROWN; LEON CASSADAY and FLOSSIE E. CASSADAY; FRED G. CLINE and VIRGINIA CLINE; MICHAEL T. COKER and FRANKIE J. COKER; W.T. COKER and EDNA B. COKER; DENVER DALY and FLORENCE DALY; H.L. DUNCAN; THELMA DUNCAN; L.E. FRAKA and WANDA FRAKA; JOE P. FULKS; THELMA B. GARWOOD; RAYMOND G. GERLACH and JANET G. GERLACH; R.C. GERLACH and LOIS GERLACH; JAMES D. HARRIS as General Partner for Harris Limited Partnership; HARRIS LIMITED PARTNERSHIP; HAROLD F. HENSLEY; GEORGE L. HERREN and VIOLA HERREN; OLIVE V. HODAPP; ROBIN R. and BETTY J. HOLLEN, JR.; GLEN C. HUDGEONS and LOIS M. HUDGEONS; LORETTA B. HUNTER; JERRY HUSKEY and PAT HUSKEY and GARY HUSKEY; CARMEN IVES, IVES FARMS, INC.; ROGER D. IVES and SUSAN IVES and SHERYL A. IVES; W.L. LANCASTER and LOIS LANCASTER; LANIER FARMS, INC.; ROBERT D. LANIER personally and as President of LANIER FARMS, INC.; RHODA E. LEGG; IVA LINDBACK; MILDRED MAGGART; O. WAYNE MAGNESS and JEAN MAGNESS; LENA MARRS; OSCAR J. MARTIN and WANETA MARTIN; LAWRENCE and NANCY McGRATH; EDMUND L. MURPHY and CAROLINE MURPHY; ROBERT L. MUSTOE; IVAN W. NEELY and ELIZABETH ANN NEELY; HAZEL J. NEELY and DEE RENAY NEELY; PHYLLIS C. NICHOLS; IRVING L. NORTON and DANA NORTON; LEROY W. OLIVER and ELLEN OLIVER; TROY OLIVER; SHORLENE OLIVER; TOMMY W. PEDIGO and IMA JEAN PEDIGO; GALA FERN POCK; JOHN E. POCK and RITA L. POCK; ALBERT S. PORTER; H.L. POSEY; URSEL PRIBBLE and LOUISE PRIBBLE; CLIFFORD D. RAGSDALE and EDITH L. RAGSDALE; GRADY RAGSDALE and JEAN RAGSDALE; WAYNE A. RAMSEY and GLADYS E. RAMSEY; JOE F. RANDOL and LOIS J. RANDOL; DAISY M. REED; JOHN B. REED; HENRY S. ROWEN and BEVERLY ROWEN; BEATRICE G. SEELIG; W.E. SPEER and PATSY SPEER; THERON O. STORY; JIM TEBBS; WILLIAM A. THOMPSON, JR.; CLARENCE R. UPTAIN and LULA BELLE UPTAIN; LLOYD W. WALLACE; PAT WARREN and RUBY WARREN; WILLIAM WASCHKE and VIOLET WASCHKE; ERNEST WATKINS and GENEVA WATKINS; BILLY D. WATSON; DONALD H. WHITE and ISABELL M. WHITE; HENRY M. WHITE and GOLDIE WHITE; BRAD E. WHITE and PAMELA KAY WHITE; WAYNE E. WHITE and BESSIE M. WHITE; DOROTHY F. WILLBANKS; AARON C. WILLIAMS; ARTHUR WILSON and ESTHER WILSON and MARIE WILSON; CLARA A. WOODMANSEE; RODGER D. WORTHY and ELIZABETH ANN WORTHY; ROBERT YOUNG and OLIA YOUNG,

———

Petitioners,

Questions Presented for Review

1. When determining the meaning of legal documents which incorporate preexisting statutory language, may courts properly defer to agency interpretations of the underlying statute that are made *after* the documents are executed?

2. Do land patents which reserve "oil and gas" interests to the United States pursuant to the Agricultural Entry Act of 1914 also reserve to the government deposits of carbon dioxide found beneath the patented land?

Statement Pursuant to Rule 29.1

All parties to this proceeding are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Opinion and Judgment of the Court of Appeals (Pet. App. 1a-39a) is reported at 915 F.2d 584 (10th Cir. 1990). The Opinion of the District Court, No. 87-F-1144 (D. Colo. Aug. 4, 1988) (Pet. App. 40a-44a) is unreported. The Opinion of the Interior Board of Land Appeals in *Irving L. Norton*, I.B.L.A. No. 88-22 (Nov. 27, 1987) (Pet. App. 64a) is unreported. The Opinion of the Interior Board of Land Appeals in *Robert D. Lanier* (Pet. App. 45a-63a) is reported at 93 I.D. 66 (1986).

Jurisdictional Statement

On September 20, 1990, the United States Court of Appeals for the Tenth Circuit entered judgment affirming the decision of the United States District Court for the District of Colorado (Pet. App. 1a-39a).

On December 1, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and including January 18, 1991, and on January 9, 1991, again extended the time for filing to and including February 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

Statutory Provisions In Case

The Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509 (codified as amended at 30 U.S.C. §§121-25 (1988)), provides in relevant part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: *Provided,* That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act.

Statement of the Case

Petitioners, Colorado ranchers and farmers, seek review of a decision by a panel of the Court of Appeals for the Tenth Circuit. The judgment below, which affects the title to carbon dioxide deposits worth more than $500,000,000.00, raises questions concerning (1) the retroactive effect on vested rights of judicial deference to administrative interpretations of statutes and (2) the proper construction of the Agricultural Entry Act of 1914 and numerous land patents which incorporate its language.

Petitioners own land in two Colorado counties. This land contains portions of the McElmo Dome, a geologic formation which holds a large and valuable deposit of carbon dioxide ("CO2"). The CO2 beneath petitioners' land is over 99 percent pure, containing only insignificant traces of hydrocarbons (about .001).

Petitioners own their land as successors in interest to patentees who took title from the federal government between 1922 and 1962, subject to the provisions and limitations of the Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509 (codified as amended at 30 U.S.C. §§121-25 (1988)) ("1914 Act"). The 1914 Act permitted homestead entry onto public domain lands which had previously been withdrawn from homestead entry because they were thought to contain "phosphate, nitrate, potash, oil, gas, or asphaltic minerals," 30 U.S.C. §121. However, the statute also required that any patents for such lands contain reservations to the United States "of the deposits [of the enumerated resources] on account of which the lands so patented were withdrawn

or classified or reported as valuable ...." *Ibid.*[1] Pursuant to this statute, all of petitioners' patents contain reservations of "oil" and "gas."

In 1979, seventeen years after the last of petitioners' patents were issued, the Regional Solicitor for the Department of the Interior stated for the first time that the United States owned the CO2 deposits under the terms of the 1914 Act and the "oil and gas" reservations in petitioners' patents.[2] *See* Memorandum from the Regional Solicitor, Denver, Department of the Interior, to the State Director of the Bureau of Land Management (July 12, 1979). After a procedural detour,[3] petitioners

[1] The statute reads in relevant part:

> Lands withdrawn or classified as phoshate, nitrate, potash, oil, gas or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable ....

30 U.S.C. §121.

[2] The vast majority of the patents at issue reserve to the government simply "oil and gas," although a few also reserve minerals such as potash or sodium. Pet. App. 3a. The more extensive reservations appear in a number of patents executed after 1933, when the Agricultural Entry Act was amended to permit reservations of sodium and sulfur. *See* Act of Mar. 4, 1933, ch. 278, 47 Stat. 1570 (codified at 30 U.S.C. §124 (1988)). Because it illustrates more sharply the error of the Interior Department and the Court of Appeals, we describe the reservations using the more common "oil and gas" language.

[3] In 1980, petitioners sought review of the Regional Solicitor's decision in district court, asserting claims under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1988), and the "Little Tucker Act," 28 U.S.C. §1346(a)(2) (1988). The District Court dismissed the APA claim for failure to exhaust administrative remedies and the "Little Tucker Act" claim for lack of jurisdiction. *See Ives v. United States*, No. 80-K-705, slip op. at 2-3 (D. Colo. Mar. 25, 1981).

filed an application with the Interior Department for a disclaimer of interest under 43 U.S.C. §1745 (1988), which authorizes the Department to issue what amounts to a quitclaim deed whenever the Secretary of the Interior determines that the United States has no interest in property. Interior Department regulations permit appeal of an adverse ruling of the Secretary to the Interior Board of Land Appeals ("IBLA"), *see* 43 C.F.R. §1864.4 (1990), whose ruling in turn constitutes reviewable agency action.

In 1986 and 1987, a quarter-century after the last of their patents were executed, petitioners obtained final rulings from the IBLA, which held that the "oil and gas" reservations in petitioners' deeds gave itself ownership not just of petroleum and natural gas, but also of pure CO2 deposits located beneath petitioners' property. *See Irving L. Norton,* I.B.L.A. 88-22 (Nov. 27, 1987); *Robert D. Lanier,* 93 I.D. 66 (1986). After another procedural detour,[4] petitioners sought review of the IBLA's decisions in the Colorado District Court pursuant to 28 U.S.C. §1331 (1988). On August 4, 1988, the District Court affirmed the IBLA decisions, holding that the principles of *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984), required it to defer to the Interior Department's view that the CO2 deposits were within the reservations of "oil and gas" interests. *See Aulston v. United States,* No. 87-F-1144, slip op. at 4 (D. Colo. Aug. 4, 1988).

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[4] Petitioners initially sought review of the IBLA decision in the Claims Court, seeking money damages for an unconstitutional taking of property. *See* 28 U.S.C. §1491 (1988). The Claims Court held that it could not address the takings issue until title to the property was first adjudicated in an Article III district court. *See Aulston v. United States,* 11 Cl. Ct. 58 (1986). Its holding was affirmed by the Court of Appeals for the Federal Circuit. *See Aulston v. United States,* 823 F.2d 510 (Fed. Cir. 1987).

On September 20, 1990, the Tenth Circuit affirmed the District Court's ruling. Again invoking *Chevron*, the court concluded: (1) that the 1914 Act did not speak directly to the precise question at issue—namely, whether CO2 is within the range of interests subject to reservation under the 1914 Act and actually reserved in petitioners' land patents, Pet. App. 23a; (2) that the Interior Department had no previous occasion to construe the relevant language in the 1914 Act, Pet. App. 23a-24a, 26a; (3) that the Department's 1986 interpretation of the 1914 Act did not conflict with prior agency interpretations of similar terms in related legislation, Pet. App. 23a-29a; and finally (4) that the agency's interpretation of the 1914 Act to include CO2 as a reserved interest was "permissible," Pet. App. 29a, and " 'reasonable in light of the statutory purpose.' " Pet. App. 35a (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455 (1978)). The court specifically noted petitioners' argument "that the determinative administrative interpretations of a statute vesting property rights are those contemporaneous with the passage of the Act," Pet. App. 24a, but it rejected the argument without discussion.

REASONS FOR GRANTING THE WRIT

There are two reasons why this case merits plenary review. First, the Court of Appeals has promulgated a new and damaging rule for judicial review of agency interpretations of statutes. The new rule is plainly wrong, has the immediate effect of unsettling and imperiling titles to nearly one million acres of land, and will unpredictably disrupt vested legal rights in countless other contexts.

The Tenth Circuit's decision greatly expands the principle of administrative deference set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to govern issues of interpretation where deference has no place. Under *Chevron*, when a federal agency interprets its governing statutes or regulations, reviewing courts ask only whether the agency's interpretation is permissible or reasonable, not whether it is the correct or best interpretation. *Id.* at 843. Once a statute or regulation has actually vested title to property, however, *subsequent* agency interpretations, however permissible or reasonable, cannot undo the past. Today's deference cannot alter yesterday's vested legal rights.

This case involves land patents executed between 1922 and 1962. All of these patents contained reservations incorporating language from the Agricultural Entry Act of 1914, which in turn was first definitively construed by the Department of the Interior in 1986. The Court of Appeals, applying *Chevron*, concluded that the Interior Department's 1986 interpretation of the 1914 Act, whose language had been incorporated decades earlier into petitioners' "oil and gas" reservations, was "permissible." *On that basis*, the court awarded the government title to the carbon dioxide.

This approach was clear error. Agency interpretations of the 1914 statute made *after* the statute's language was incorporated into other legal documents, such as land patents, cannot possibly affect the meaning of those other documents. The question in such cases is not whether an agency interpretation is "permissible" or "reasonable" but which interpretation of the statute is the better one. Otherwise, there can be no security in a landowner's title or in any other vested rights subject to reinterpretation in this fashion.

The Court of Appeals' faulty methodology leads to absurd and far-reaching consequences. It is well established that court affirmance of an agency decision as permissible under *Chevron* leaves the agency free to reinterpret the statute in other permissible ways at later times. In the present case, it is apparent that the Court of Appeals would have upheld as permissible an agency interpretation of the 1914 Act establishing that "oil and gas" referred only to fuel gas and not to the carbon dioxide. Thus, if the Interior Department chooses to reverse its 1986 view in the future, the court should, on the standard of "permissibleness," uphold that result and decide that petitioners do, after all, own the carbon dioxide under their land. Title or other vested legal rights, however, cannot keep shifting in this manner—so that title is in the government today, the petitioners tomorrow, and perhaps the government again next year—depending on the agency's current "permissible" interpretation of the statute. Nor can it be the case that private persons who enter upon land under government patents, or who enter into contracts with the government, can have their entirely legitimate understandings of their rights defeated 60 or 70 years later by a new agency interpretation that falls within the range of the "permissible."

This is precisely the error made by the Court of Appeals, whose decision stands as the law of the Tenth Circuit. In view of the Tenth Circuit's critical role in land patent disputes, the erroneous new rule is of enormous practical and legal consequence. Review by this Court is plainly warranted.

Second, whether or not it was proper for the court to give weight to the agency's interpretation decades after the statutory meaning was incorporated into legal instruments, the court's acceptance of the agency's views deformed the 1914 Act and produced a result contrary to the clear and unambiguous meaning of the statute. As in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), in which this Court granted review of a Tenth Circuit decision construing reservations in land patents "[i]n view of the importance of the case to the administration of the more than 33 million acres of land patented under the [Stock-Raising Homestead Act of 1916]." *id.* at 42, this case is crucial to the administration of the nearly 5.5 million acres of land subject to federal "oil and gas" reservations—hundreds of thousands of acres of which are located in the Tenth Circuit.[5] The panel's misconstruction of the statute is of enormous importance and warrants review.

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[5] As of 1948, the six states composing the Tenth Circuit contained 951,249 acres of land subject to oil and gas reservations (including reservations of oil, gas, and other minerals), amounting to almost forty percent of the land subject to such reservations. *See* Bureau of Land Management, U.S. Dep't of the Interior, Public Land Statistics 1989, at 16. Since 1948, an additional 2,973,804 acres of land nationwide have been patented with similar reservations, though Bureau of Land Management statistics do not break down these more recent reservations by state. *See id.* at 17.

I. When Construing Legal Documents Which Incorporate Statutory Language and Meaning, Courts May Not Defer to Agency Interpretations of the Underlying Statute That Are Made *After* the Documents Are Executed.

A. The Court of Appeals Wrongly Allowed the Interior Department's 1986 Interpretation of the 1914 Act to Affect Its Construction of Documents Which Had Vested Titles to Property Decades Earlier.

Having first decided (erroneously, as we demonstrate in Part II) that the 1914 Act is ambiguous on the question whether petitioners' "oil and gas" reservations include CO2 or only fuel gas found in conjunction with oil, the Court of Appeals held:

> We now must consider whether the Department of the Interior's construction of the 1914 Act is a permissible one. To affirm the Department's decision, we "need not conclude that the agency construction was the only one it permissibly could have adopted," *nor must it accord with "the reading [we] would have reached if the question initially had arisen in a judicial proceeding."*

Pet. App. 29a (quoting *Chevron*, 467 U.S. at 843 n.11) (emphasis added) (citation omitted). The court also observed that "[u]ntil the inception of this dispute, the Department of the Interior had no occasion to determine explicitly whether carbon dioxide is 'gas' within the meaning of the 1914 Act." Pet. App. 23a-24a. Thus, the agency's 1986 interpretation came retroactively to determine titles as much as 70 years old under the 1914 Act.

This novel application of *Chevron* makes no sense whatsoever. The Interior Department is, of course, entitled to deference when it construes provisions of the 1914 Act. A reasonable agency interpretation of the

statute in 1986 therefore establishes the Act's meaning for subsequent events, and may well be entitled to deference as to the scope of titles taken *after* that interpretation was promulgated. But no sensible principle of administrative review permits that interpretation retroactively to be read into documents which long ago vested rights in individuals or the government. Those rights were fixed when the documents were executed, and only agency interpretations contemporaneous with their execution can bear on their meaning.

B. The Court of Appeals' Novel Deference Rule Destroys the Stability of Land Titles Subject to the 1914 Act.

The Court of Appeals' failure to grasp the significance of the "timing factor" in deference analysis leads to absurd consequences and destroys the stability of land titles and other vested rights. It injects federal agencies into the state land title process decades after patents are issued.

When deference is due an agency interpretation of a statute, "reasonableness" or "permissibleness" is the criterion of review, not correctness. Often that will mean that an interpretation could go either way and be upheld by a reviewing court. The agency may even later change its interpretation and again be upheld. *See, e.g., NLRB v. Bufco Corp.*, 899 F.2d 608, 610-11 (7th Cir. 1990); *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124, 1129-31 (9th Cir. 1988) (*en banc*).

Chevron itself illustrates the point. This Court reversed the judgment of the D.C. Circuit because the Environmental Protection Agency's view that the term "stationary source" in the Clean Air Act could include

entire factories and not just each outlet for pollution was reasonable. Should the EPA now reverse its position, opposing counsel could not win simply by pointing to the prior *Chevron* decision. The question, once more, would involve the range of permissible interpretations. But no statute can take on such chameleon-like meanings once it has been incorporated into a document giving title. Otherwise, every time the Interior Department again changed its view of the 1914 Act, ownership of the CO2 would abruptly shift from petitioners to the government or vice versa.

This "badminton" theory of title is obviously untenable: the CO2 belongs either to petitioners or to the government. The title was vested when the patents were issued, and it was vested according to the statute's meaning at that time.

C. The Decision Threatens the Stability of Land Titles Under Other Patent Statutes, As Well As Numerous Other Forms of Vested Rights.

The Court of Appeals' willingness to grant deference to the Interior Department's noncontemporaneous interpretation of the 1914 Act was not merely plain error affecting thousands of acres and hundreds of millions of dollars in this case.[6] As the law of the Tenth Circuit, the panel's erroneous approach would likewise govern titles under other important statutes, such as the Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified as amended at 43 U.S.C. §§161-302 (1988)), and the Stock-Raising Homestead Act of 1916, ch. 2, 39 Stat. 862 (codified as

[6] Petitioners represent 15,742.01 of the 203,234.26 acres in the McElmo Dome unit, *see Robert D. Lanier*, Pet. App. 47a n.2, giving them a 7.75 percent interest in the unit's 8.4 trillion cubic feet of recoverable CO2 reserves. In 1982, when the McElmo Dome unit was formed, the price of CO2 was 80 cents per thousand cubic feet. At that price, petitioners' interest in the deposit is worth more than $520,000,000.00.

amended at 43 U.S.C. §§291-99 (1988)).[7] Furthermore, apart from these entirely foreseeable consequences for land patents, the panel's rule of retroactive deference will apply to other legal documents incorporating statutory or regulatory language. For example, Title 48 of the Code of Federal Regulations contains numerous standard provisions for government procurement contracts. *See* 48 C.F.R. Pt. 52 (1989). Presumably, after-the-fact agency interpretations of these provisions will also reassign the rights of individuals if the agency's subsequent interpretations are within the range of the "permissible," even though not what the court would have decided had it approached the task of statutory or regulatory construction without deference to the agency. The mischief, both actual and potential, created by the panel's new approach to administrative review is thus not only pernicious but sweeping.

D. The Court of Appeals Should Have Sought the *Correct* Meaning of the 1914 Act.

The Court of Appeals' conclusion in this case that the Interior Department's 1986 interpretation of the word "gas" in the 1914 Act was "permissible" had no relevance whatever to the meaning of the 1914 statute when it was enacted or when its meaning was incorporated into the "oil and gas" reservations in petitioners' land patents. The Court of Appeals should have sought the correct or better meaning of the 1914 Act and decided who had title to the CO2 beneath petitioners' lands on that basis. The error below is clear, it is serious, and, we submit, the judgment requires review and reversal by this Court.

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[7] Both statutes were repealed by the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (codified at 43 U.S.C. §§1701-82 (1988)), but the statutes retain force because "[e]xisting patents were unaffected by the repeal." *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 38 n.1 (1983).

II. Whether Or Not Deference Is Given to the Interior Department's 1986 Views, the 1914 Act Clearly and Unambiguously Leaves Petitioners With Title to the CO_2 Beneath Their Lands.

In addition to the foregoing problems concerning the application of *Chevron* in contexts where statutory language and meaning is incorporated into other legal documents, there is another, and equally compelling, reason to grant certiorari in this case. Simply put, the Department of the Interior's sweeping construction of the word "gas," as it is used in the 1914 Act and petitioners' patents,[8] is contrary to the statute's plain meaning. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). Natural gas is all that *could have been* reserved by the government under the statute, and natural gas is all that *was* reserved by the government in petitioners' patents. The Court of Appeals' contrary ruling affects a vast quantity of land, and it stands as the law of a circuit with particular responsibility for adjudicating land patent disputes.

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[8] We repeat the relevant language from the statute:

> Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable . . . .

30 U.S.C. §121.

A. CO2 Was Not a Mineral "On Account of Which" Petitioners' Lands Were Withdrawn From Homestead Entry, and It Therefore Could Not Have Been Reserved Under the 1914 Act.

We will shortly argue that the term "gas," as it is used in the 1914 Act, encompasses only natural (or fuel) gas. Even if that argument is incorrect, however, the statutory text and the agency's own administrative findings irrefutably demonstrate that petitioners' patents *did not in fact* reserve to the government anything other than oil and natural gas.

The text of the 1914 Act permits the government to reserve only "*the deposits on account of which the lands were withdrawn or classified or reported as valuable* . . . ." 30 U.S.C. §121 (emphasis added). Thus, the 1914 Act contains two separate limitations on the government's power to reserve resources beneath patented land. First, the reserved minerals must be within the statute's enumeration of "phosphate, nitrate, potash, oil, gas, or asphaltic minerals." Second, the reserved minerals *must have been the specific reason why the specific patented land was originally withdrawn from homestead entry.* For example, if land was withdrawn from entry (or classified or reported as valuable) because it was believed to contain phosphate deposits, then the government's reservation under the 1914 Act could lawfully extend only to phosphate. A reservation of "oil and gas" with respect to that land would be blatantly unlawful.

The point is dispositive in this case because the IBLA specifically found "*no evidence* that the land involved herein was withdrawn, classified, or reported as valuable on account of carbon dioxide." Pet. App. 53a n.6

(emphasis added). It ineluctably follows that CO2 *could not have been* reserved in petitioners' patents even if it was within the enumeration of resources in the 1914 Act.

The agency's reason for rejecting this claim, which was adopted without meaningful elaboration by the Court of Appeals, Pet. App. 17a-18a, is incomprehensible. After noting the absence of any evidence indicating that petitioners' lands were withdrawn "on account of" CO2 deposits, the agency continued: "However, the mineral reservations clearly embrace the term 'gas.' We must, therefore, presume that the land was either withdrawn, classified, or reported as valuable on account of 'gas.' " Pet. App. 53a n.6.

Quite so. But given petitioners' longstanding concession that their land was originally withdrawn from homesteading "on account of" suspected *petroleum* deposits, what obviously follows from the inclusion of "gas" in the reservations is that the government could, and did, reserve to itself *the natural (fuel) gas that typically accompanies oil deposits.* The point was clear to everyone at the time of enactment of the 1914 Act,[9] and we simply cannot fathom how the agency and the Court of Appeals could have concluded otherwise.

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[9] *See* United States Geological Survey Bulletin 623, Petroleum Withdrawals and Restorations Affecting the Public Domain 58 (1916) (emphasis added):

> None of the withdrawal orders [removing land from homestead entry for "oil"] have specified natural gas [as a reason for such withdrawal], although it is mentioned in some of the recommendation letters transmitting the orders. The question was raised whether gas should be reserved to the United States in patents issued for withdrawn lands under the act of July 17, 1914 [*i.e.*, the 1914 Act]. The following letter

(Footnote continued on following page.)

B. CO2 Is Not "Gas" Within the Meaning of the 1914 Act or Petitioners' Patents, Which Refer Only to Natural Gas.

Petitioners have contended throughout this case that the 1914 Act clearly permits reservation of two classes of minerals: fertilizer minerals ("phosphate, nitrate, potash") and fuel minerals ("oil, gas, or asphaltic minerals"). The government, on the other hand, has claimed, and the Court of Appeals has accepted as plausible, that the statute permits reservation of three classes of minerals: fertilizer minerals ("phosphate, nitrate, potash"), fuel minerals ("oil ... or asphaltic minerals"), and all gaseous substances of any nature ("... gas ..."). The text of the statute simply will not support the latter reading.

The statute identifies the land subject to reservation as "lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits ...." 30 U.S.C. §121. That wording makes sense only if "gas" is read as a fuel mineral, *i.e.*, natural gas, of the sort that is typically found associated with oil. On that understanding, which

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(Footnote continued from preceding page.)

> [dated April 26, 1915, from the Assistant Secretary of the Interior to the Comissioner of the General Land Office] resulted: ... I enclose herewith communication from the Director of the Geological Survey, with respect to patents ... for lands included within the limits of petroleum withdrawals, act July 17, 1914 (38 Stat., 509) .... As stated by the Director, there is such an intimate association and relation between oil and *natural gas* that lands withdrawn because of their oil deposits were also withdrawn because of their gas content ... [and] every oil withdrawal constitutes a report that the lands withdrawn are also valuable for their deposits of gas .... [T]he reservation inserted into the patents above described should mention both oil and gas.

is commonplace when the terms "oil" and "gas" are conjoined,[10] the statute contains two natural groupings: the first three enumerated resources are each fertilizer minerals, and the last three enumerated resources are each fuel minerals. This is exactly what one would expect from drafters who intended to cover minerals within those two classes.[11]

It is far more difficult to understand why a drafter would write the statute this way if he or she intended to convey the meaning the government and the Court of Appeals have forced on the words. One would have to believe that the drafter first listed three fertilizer minerals, then one fuel mineral, then all gas of any kind, and then one more fuel mineral. It is very unlikely that a drafter would split the two fuel minerals apart in order to put a wholly different classification between them. To convey the meaning accepted as plausible by the Court of Appeals, the drafter would, at a minimum have expressed Congress' intention as follows: "phosphate, nitrate, potash, oil, asphaltic minerals, and all gas." In fact, since it was well understood that in these matters "gas" meant natural or fuel gas, particularly when used in direct conjunction with "oil," the drafter, to be safe, would have written "and all gas of any kind."

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[10] *See* H. Williams & C. Meyers, Manual of Oil and Gas Terms 298 (1981) ("In the oil and gas industries, [gas] means natural gas").

[11] Just two months after the passage of the 1914 Act, Congress included a letter from First Assistant Secretary of the Interior, A. A. Jones, in S. Rep. No. 806, 63rd Cong., 2d Sess., Report to Accompany S. 6484 (1914), stating that from the 1914 Act "it appears that Congress has, in the United States proper, inaugurated a definite policy of separate dispositions of surface estates and mineral deposits in *certain classes of important fuel and fertilizer minerals.* With this policy, this Department is in hearty accord." *Id.*, at 1-2 (emphasis added).

The Court of Appeals agreed that this analysis "overwhelmingly supports the proposition that gas indirectly or directly valuable for fuel was intended to be reserved," Pet. App. 14a, but refused to conclude that *only* fuel gases are subject to reservation under the statute. Pet. App. 14a-16a. Neither of the court's proposed alternative constructions, however, are plausible.

First, the court suggested that "[t]he six enumerated substances constitute one class if the class is defined as 'nonmetalliferous minerals.' " Pet. App. 15a. This is a non sequitur. The enumerated substances are all indeed nonmetalliferous minerals, but they obviously do not exhaust the *universe* of nonmetalliferous minerals, which includes everything from helium to bat guano. It remains to be explained why the statute organizes this particular subset of nonmetalliferous minerals in the fashion that it does.

Second, the court pointed to a 1914 colloquy between the Chairman of the House Committee on Public Lands and the Director of the United States Geological Survey concerning an unenacted bill proposing leasing procedures for certain nonmetalliferous minerals as suggesting that the Chairman "appeared to have thought that each enumeration may have constituted a separate 'class' of minerals." Pet. App. 16a:

> Rep. Ferris: This bill purports to deal with six classes of deposits in the United States.
>
> Mr. Smith: You might make that simpler by saying there are two general classes of deposits, mineral fuels and mineral fertilizers.
>
> Rep. Ferris: I was following the wording of the bill.

Hearings on H.R. 14094 Before the House Committee on the Public Lands, 63d Cong., 2d Sess. 16 (1914) (*quoted in* Pet. App. 21a). If anything, this passage strongly *supports* petitioners' view of the meaning of the 1914 Act, which, unlike the unenacted bill discussed above, plainly groups together in sequence "two general classes" of deposits.[12]

C. No Extrinsic Considerations Cast Doubt on the Statute's Plain Meaning.

In the various proceedings below, petitioners have consistently argued that the legislative history, context, and purpose of the 1914 Act all strongly support the reading mandated by the text. The arguments are lengthy, and we will not attempt to summarize them here (though we will vigorously advance them if certiorari is granted). It suffices for purposes of this petition that while the Court of Appeals did not accept our arguments, neither did it find that these extrinsic considerations strongly favored the government:

> Our review of legislative and historical materials surrounding the enactment of the 1914 Act fails to clear up the ambiguity in the word "gas" as employed in the 1914 Act. [Petitioners] point to nothing in these extrinsic sources even intimating that Congress has "directly addressed the precise question at issue," *Chevron*, 467 U.S. at 843, in favor of their proposed limiting construction. If anything, a comparison of the term "gas" as used in related statutes favors a generic construction of the

[12] The Interior Department has itself concluded that "[*t*]*he specific intent of Congress* in enacting the Act of July 17, 1914 [the 1914 Act] was to allow agricultural entry of certain withdrawn and classified lands while reserving those *fuel and fertilizer minerals* specified in the patent." Memorandum of the Regional Solicitor of the Department of the Interior, Denver, to the State Director, BLM, Colorado (July 12, 1979) (Subject: Reservation of carbon dioxide gas in land patent 1-2) (emphasis added).

> term, although we believe it equally likely that Congress had no intent whatsoever concerning carbon dioxide gas.

Pet. App. 23a. Thus, it is clear, at a minimum, that these considerations cannot *overcome* the force of petitioners' plain meaning argument, even if they do not (as we have contended) overwhelmingly reinforce it.

We do, however, wish to comment in passing on the one extrinsic consideration that the Court of Appeals read as "favor[ing] a generic construction" of the word "gas" in the 1914 Act. The Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§181-287 (1988)) ("MLA"), authorizes the Interior Department to lease governmentally owned "coal, phosphate, sodium, oil, oil shale, or gas," 30 U.S.C. §181, subject to the following proviso:

> [T]he United States reserves the right to extract helium from all gas produced from lands permitted, leased or otherwise granted under the provisions of this Act .... Provided further, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof ....

Ibid. The Court of Appeals concluded that this statute should be read *in pari materia* with the 1914 Act, and that its language "has meaning only if Congress understood 'gas' to mean the raw gas stream from a well, including both combustible and noncombustible components." Pet. App. 22a. That is, unless a lease of governmentally-owned "gas" rights under the MLA generically conveyed the rights to nonfuel gases like helium, the specific reservation of helium rights would be pointless.

Even assuming, as we strongly doubt, that the MLA and the 1914 Act can properly be read *in pari materia*,[13] the argument proves too little. Consider a lease of rights to "coal." The coal deposits will contain some quantity of impurities (such as sulfur or phosphorus) which do not themselves constitute "coal." Nonetheless, a conveyance of "coal" would ordinarily be taken to convey as well the commingled impurities—not because they are "coal," but because they are commingled. Such a conveyance of "coal" would not, however, include a contiguous but separate deposit of pure sulfur.

Similarly, where fuel gas deposits leased under the MLA contain commingled quantities of helium impurities, the conveyance of "gas" rights would, in the absence of a statutory reservation, ordinarily convey as well the commingled helium—not because the helium is "gas" within the meaning of the MLA, but because it is commingled. Difficult questions can arise when the quantity of a commingled impurity in a conveyed or reserved deposit is so large that the impurity is arguably a separate deposit, but the principle is clear.

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[13] For one thing, the MLA deals with the leasing of resources *clearly owned* by the government, while the 1914 Act deals with the *allocation of resource ownership* between the government and the patent-holder. Accordingly, there are good reasons to read the former statute more broadly than the latter.

D. The Tenth Circuit's Crucial Role in the Administration of Land Patents Warrants a Grant of Certiorari.

The panel's decision in this case stands as the law of the Tenth Circuit, which includes the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. As of 1948, these states contained 951,249 acres of land (nearly forty percent of the total) whose patents are subject to "oil and gas" reservations. Since 1948, an additional 2,973,804 acres of land have been patented with similar reservations, many no doubt in the Tenth Circuit. This case alone involves more than 15,000 acres and approximately $500,000,000.00 worth of deposits. The consequences of the Court of Appeals' decision are enormous.

This Court has previously recognized the crucial role of the Tenth Circuit in construing land patent statutes such as the 1914 Act. For example, *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), concerned the scope of a provision in the Stock-Raising and Homestead Act of 1916, ch. 9, 39 Stat. 862 (codified as amended at 43 U.S.C. §§291-99 (1988)) ("SRHA"), reserving to the government title to "all the coal and other minerals," 43 U.S.C. §299, in lands opened for settlement under the SRHA. In a 5-4 decision, this Court reversed a holding of a Tenth Circuit panel that "gravel . . . did not constitute a mineral reserved to the United States under the SRHA," 462 U.S. at 42. Significantly, the Court explained that this "issue of first impression in the federal courts," *id.* at 42 n.4, was worthy of certiorari "[i]n view of the importance of the case to the administration of the more than 33 million acres of land patented under the SRHA . . . ." *Id.* at 42. This case is equally important to the administration of the land patented under the 1914 Act, and equally worthy of review by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY LAWSON
357 E. Chicago Avenue
Chicago, Illinois 60611
(312) 503-0306

ROBERT H. BORK
Counsel of Record
1150 17th Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 862-5800

LUKE J. DANIELSON
GERSH & DANIELSON
1775 Sherman Street, Suite 1875
Denver, Colorado 80203
(303) 863-1115

STEPHEN H. MUSE
5919 Winding Ridge
San Antonio, Texas 78239
(512) 655-7559

Attorneys for Petitioners

APPENDIX A

Opinion of the United States Court of Appeals for the Tenth Circuit Dated September 20, 1990

PUBLISH

UNITED STATES COUT OF APPEALS
TENTH CIRCUIT

No. 88-2349

FILED
United States Court of Appeals
Tenth Circuit
SEP. 20 1990
ROBERT L. HOECKER
Clerk

JOE AULSTON and LOLA AULSTON, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellees,
and

SHELL WESTERN E & P, *et al.*,
Intervenors-Appellees.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 87-F-1144)

Robert H. Bork, Washington, D.C. (Luke J. Danielson, Denver, Colorado, and Stephen Muse, San Antonio, Texas, with him on the briefs), for Plaintiffs-Appellants.

George W. Van Cleve (Michael J. Norton, Acting United States Attorney and Paula M. Ray, Asst. U.S. Attorney, Denver, Colorado, with him on the brief), for Defendants-Appellees.

Marla J. Williams (Steven B. Richardson with her on the brief), Holme Roberts & Owen, Denver, Colorado, for Intervenors-Appellees.

Before HOLLOWAY, *Chief Judge*, SEYMOUR, and MOORE, *Circuit Judges*.

SEYMOUR, *Circuit Judge*.

This case presents us with the question whether oil and gas reservations to the United States in federal land patents pursuant to the Agricultural Entry Act of 1914, 30 U.S.C. §§121-125 (1988) (1914 Act), include deposits of carbon dioxide gas. The Department of the Interior and the district court concluded that the carbon dioxide gas was reserved to the government. We agree and hold that the term "gas" in the 1914 Act reasonably may be interpreted to include the carbon dioxide deposits.

I.

A.

Plaintiffs are owners of ranchlands and dryland farms in Montezuma and Dolores Counties in the State of Colorado. Underlying or adjacent to these lands are portions of the McElmo Dome, a geologic formation

containing a large amount of nearly pure carbon dioxide, which is an inert, non-combustible, odorless gas at normal temperature and pressure conditions. The gas was discovered in the Dome in the 1950s. Although of little or no commercial value for decades,[1] the combination of the domestic oil shortages of the 1970s and the resultant development of tertiary oil recovery methods employing carbon dioxide suddenly transformed the gas into a valuable resource. Since 1982, carbon dioxide gas has been pumped from plaintiffs' lands by private oil companies under a leasing arrangement with the United States government. The gas is transported by pipeline to otherwise depleted oil fields in Texas, where it is used both as a pressurizer and a solvent to enhance oil recovery there.

The United States' claim to ownership of the carbon dioxide gas derives from reservations to the United States of "oil and gas" or "oil, gas, potash and sodium" contained in plaintiffs' or their predecessors' federal land patents issued under the homestead laws. The reservations at issue were created pursuant to the Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509 (codified as amended at 30 U.S.C. §§121-125 (1988)) (1914 Act). The 1914 Act provided for homestead entry onto lands withdrawn from entry, classified, or reported as valuable for "phosphate, nitrate, potash, oil, gas, or asphaltic minerals," subject to reservations to the United States of the enumerated resources "on account of which the lands were withdrawn or classified or reported as valuable." *Id.* §121. Plaintiffs claim that the term "gas" in the 1914 Act and in the patents refers to combustible hydrocarbon gas only.

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[1] In the 1930s, carbon dioxide gas had a limited commercial value in the making of dry ice for refrigeration.

To gain a proper understanding of the statute at issue, we must put it into its historical context. As is true for much of the West, plaintiffs' lands originally comprised part of a vast public domain. In the second half of the nineteenth century, Congress enacted homestead laws to encourage settlement and agricultural development of these immense stretches of land. *See e.g.*, Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified as amended at 43 U.S.C. §§151-302 (1982)), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2787.

Settlement occurred at a rapid pace and full fee title to much of this land passed into private hands. In the conservation-minded, Progressivist era of the first few decades of the twentieth century, the concern arose that valuable resources in the public domain should remain in public hands to avoid imprudent development, add to public revenues, and avert the threat of monopolization. *See generally* Colby, *The New Public land Policy with Special Reference to Oil Lands*, 3 Cal. L. Rev. 269 (1915). In particular, the homestead entry laws were viewed as subject to abuse by speculators interested only in the mineral resources underlying them. *See The Classification of the Public Lands*, 537 USGS Bull. 38-39, Dep't of the Interior (1913) (Bulletin 537). Presumably for fear of the consequences of legislative delay, the Department of the Interior unilaterally withdrew from homestead entry millions of acres believed to contain oil, gas, phosphate, or coal. *See id.* at 38-43; *see also United States v. Midwest Oil Co.*, 236 U.S. 459, 478-79 (1915) (describing executive land withdrawals).

In 1910, Congress recognized the executive's authority to make land withdrawals and provided a procedure by which the Department of the Interior could withdraw any public lands and reserve them for the public purpose set forth in the withdrawal order. *See* Pickett Act of 1910, ch. 421, 36 Stat. 847 (codified as amended at 43 U.S.C. §§141-142 (1970)), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792; *see also Midwest Oil Co.*, 236 U.S. at 482-83 (validating executive withdrawals and discussing purpose and effect of Pickett Act). The Pickett Act withdrawals were only partial, however. When originally enacted, the Act provided that lands so withdrawn would remain open for development and purchase of "minerals *other than* coal, oil, gas and phosphates." Ch. 421, 36 Stat. 847. In 1912, Congress amended the Pickett Act and replaced this list of excluded minerals with a provision allowing exploration and purchase of metalliferous minerals on withdrawn lands. *See* Act of August 24, 1912, ch. 369, 37 Stat. 497. Under the Pickett Act, the Department of the Interior continued with its policy of withdrawing vast quantities of land it believed valuable for petroleum (including gas), phosphate, potash, waterpower, coal, and other nonmetalliferous minerals. *See* Letters from the Secretary of the Interior to Congress (Dec. 13, 1912 and December 16, 1913) (Report on Land Withdrawals from Settlement, Location, Sale, or Entry under Provisions of the Act of Congress Approved June 25, 1910, 36 Stat. 847).

In addition to the Pickett Act land withdrawals, the United States Geological Survey (USGS) embarked on a large-scale program of classification of the public lands according to their mineral, hydrologic, and agricultural

characteristics. *See generally* Bulletin 537. Under the USGS system then in use, mineral lands could be classified as coal lands, oil and gas lands, potash lands, or phosphate lands, among other minerals. *See id.* Concerning oil and gas, the Survey noted:

> "The immediate purpose of the classification of oil and gas land is to withhold from entry all lands containing valuable deposits of fluid hydrocarbons pending the enactment of adequate legislation providing for their disposition. The ultimate purpose of the classification is to determine the position and extent of the areas whose value for their deposits of oil or gas, whether proved by actual drilling or indicated by favorable geologic conditions, is greater than their value for agriculture or other purposes and to provide for a disposition of the deposits in accordance with this greater value."

Id. at 117. Once land was so classified, a proposed withdrawal order would be sent to the Secretary of the Interior for appropriate action.[2]

In the wake of these large-scale withdrawals, it was evident that valuable farm or ranch lands would go untilled or ungrazed because they were withdrawn from entry on account of the valuable deposits believed to exist there. Congress responded with a series of acts, including 1914 Act, permitting homestead entry onto such lands while reserving various types of mineral estates in the United States. *See, e.g.,* Act of March 3, 1909, ch. 270, 35 Stat. 844 (codified at 30 U.S.C. §81 (1988)) (reserving coal); Act of August 24, 1912, ch. 367, 37 Stat. 496, *repealed by* Act of December 16, 1930, ch. 14, 46 Stat. 1028 (reserving enumerated mineral resources in land patents issued in Utah); 1914 Act

[2] The Pickett Act also authorized withdrawals to allow time for classification of lands. *See* ch. 421, 36 Stat. 847.

(authorizing reservations of phosphate, nitrate, potash, oil, gas, and asphaltic minerals); Stock Raising Homestead Act of December 29, 1916, ch. 9, 39 Stat. 864 (codified at 43 U.S.C. §299 (1982)) (reserving "coal and other minerals"); *see generally* Bate, *Mineral Exceptions and Reservations in Federal Public Land Patents*, 17 Rocky Mtn. Min. L. Inst. 325, 345-50 (1972).

Plaintiffs' or their predecessors' patents contain reservations of "oil and gas" or "oil, gas, potash and sodium"[3] pursuant to the 1914 Act. A typical patent grants the land to the homestead claimant

> "EXCEPTING AND RESERVING TO THE UNITED STATES all oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the [1914 Act]."

Rec., vol. II, at 2. The relevant portions of the 1914 Act in turn provide:

> "Lands withdrawn or classified as phosphate, nitrate, potash, oil, *gas*, or asphaltic minerals, or which are valuable for these deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same."

30 U.S.C. §121 (1988) (emphasis added).

[3] In 1933, the 1914 Act was amended to include reservations of sodium and sulphur. *See* Act of Mar. 4, 1933, ch 278, 47 Stat. 1570 (codified at 30 U.S.C. §124 (1988)).

Section 2 of the 1914 Act specifies that any deposits so reserved "shall be subject to disposal by the United States . . . as shall be hereafter expressly directed by law." *Id.* §122. Six years later, Congress provided for the disposal of the reserved deposits in the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§181-287 (1988)). The Mineral Leasing Act provided the Department of the Interior with authority to lease deposits of coal, phosphate, oil shale, oil, gas, and sodium owned by the United States. Significantly, the Mineral Leasing Act expressly excepted helium from its provisions regulating the leasing of "gas" rights. *See id.* §181. Under various versions of this Act, the United States has leased its gas rights in hydrocarbons and in carbon dioxide, including the carbon dioxide at issue here, to various private concerns.

B.

In the late 1970s, after the carbon dioxide in the McElmo Dome was discovered and its value in oil production became apparent, various plaintiffs sought the Department of the Interior's determination as to who owned it. The Department asserted that the deposits were "gas" within the meaning of the reservations in plaintiffs' patents under the 1914 Act. *See* rec., vol. II, at 201-03 (Memorandum from the Regional Solicitor, Denver, Department of the Interior, to the State Director of the Bureau of Land Management (July 12, 1979)). Plaintiffs responded with a class action in the United States District Court for the District of Colorado challenging the Interior Department's assertion of ownership of the carbon dioxide, and seeking compensation under the "Little Tucker Act," 28 U.S.C. §1346(a)(2) (1988).

The district court dismissed the class action. The attack on the Interior Department's determination of ownership was ruled unripe because plaintiffs had failed to exhaust their administrative remedies by bringing an administrative appeal before the Interior Board of Land Appeals (IBLA). *See* 43 C.F.R. §3000.4 (1989). The district court also held it lacked jurisdiction over the Tucker Act claim because it exceeded $10,000. *See* 28 U.s.C. §1346(a)(2). The court observed that claims against the United States exceeding $10,000 must be brought in the Claims Court under 28 U.S.C. §1491 (1988). *See Ives v. United States,* Civ. No. 80-K-705 (D. Colo. March 25, 1981).

Plaintiffs returned to the administrative arena. Following the district court's suggestion, plaintiffs filed a private contest action against the Department of the Interior which was dismissed because the United States is not a proper defendant in such actions. *See* 43 C.F.R. §4.450 (1989). The Department suggested that plaintiffs file an application for a recordable disclaimer of interest, under which the FLPMA authorizes the Interior Department to issue a sort of quitclaim deed to clear title to real property in which the United States may have a colorable but invalid interest. *See* 43 U.S.C. §1745 (1982); 43 C.F.R. §§1864.0-1 to .4 (1989). Plaintiffs filed their application, which the Department denied. The Department's decisions were appealed to the IBLA pursuant to 43 C.F.R. §1864.4, and the IBLA affirmed. *See Robert D. Lanier,* 93 Interior Dec. 66 (1986); *Norton,* I.B.L.A. 88-22 (Nov. 27, 1987).

Plaintiffs sought review of the IBLA's decision, in conjunction with their damages claim, in the United States Claims Court. The Claims Court concluded, however, that it had no jurisdiction to set aside the

IBLA's decision. The court's inability to determine ownership of the carbon dioxide also precluded consideration of plaintiffs' Tucker Act claim because plaintiffs' ownership of the gas is an obvious predicate to the validity of their damage claim. The Claims Court therefore dismissed the action. *See Aulston v. United States,* 11 Cl. Ct. 58 (1986).

On appeal, the Federal Circuit affirmed. The court realized, however, that substantial time had already elapsed in administrative and judicial forums and that plaintiffs had yet to seek review of the IBLA's decision in the proper forum. By the time their ownership would be finally determined, the statute of limitations on their damage claim would likely run. The court therefore vacated the dismissal of plaintiffs' claim for damages, directing that the action be stayed pending resolution of the ownership issue. *See Aulston v. United States,* 823 F.2d 510, 514 (Fed. Cir. 1987).

Plaintiffs returned to the Federal District Court in Colorado to seek review of the IBLA's decision, and the district court affirmed the IBLA. *See Aulston v. United States,* No. 87-F-1144 (D. Colo. Aug. 4, 1988). Plaintiffs appealed.

II.

Our appellate jurisdiction to review a final order of the district court is based on 28 U.S.C. §1291 (1988). Plaintiffs brought their action under 43 U.S.C. §1745 (1982), and appealed to the IBLA pursuant to 43 C.F.R.

§1964.4 (1989). The district court's jurisdiction to review IBLA decisions derives from 28 U.S.C. §1331 (1988) read in conjunction with 5 U.S.C. §§701-706 (1988).[4]

On apeal from a district court's review of an agency decision, " 'the identical standard of review is employed at both levels; and once appealed, the district court decision is accorded no particular deference.' " *Webb v. Hodel*, 878 F.2d 1252, 1254 (10th Cir. 1989) (quoting *Brown v. United States Dep't of the Interior*, 679 F.2d 747, 748-49 (8th Cir. 1982)). Recently, the Supreme Court has reiterated the analysis a court undertakes when it reviews the validity of an agency's interpretation of a statute the agency is charged with administering:

> "We first ask 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' 'In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.' But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute,' that is, whether the agency's construction is 'rational and consistent with the statute.' "

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[4] Intervenors assert that this action is time-barred under the statute of limitations contained in 30 U.S.C. §226-2 (1988). This limitation does not apply to actions under the FLPMA, but rather to the validity of lease permits issued pursuant to the Mineral Leasing Act, 30 U.S.C. §§181-287 (1988). *See Park County Resource Council v. United States Dep't of Agric.*, 817 F.2d 609, 616 (10th Cir. 1987) (30 U.S.C. §226-2 applies to actions contesting agency decisions made under the Mineral Leasing Act).

Sullivan v. Everhart, 110 S. Ct. 960, 964 (1990) (citations omitted). However, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984).

III.

A.

In interpreting statutes, we begin with the relevant language. When the terms of a statute are unambiguous, our inquiry is complete, except in rare and exceptional circumstances. *See Rubin v. United States*, 449 U.S. 424, 430 (1981). In interpreting the relevant language, however, we look to the provisions of the whole law, and to its object and policy. *See Dole v. United Steelworkers*, 110 S. Ct. 929, 934 (1990).

The 1914 Act creates power in the federal government to reserve the named resources in federal patents for "[l]ands withdrawn or classified as phosphate, nitrate, potash, oil, *gas*, or asphaltic minerals, or which are valuable for those deposits." 30 U.S.C. §121 (emphasis added). The operative word "gas" has numerous meanings in common speech,[5] in the natural sciences,

[5] A typical dictionary definition of gas reads: "1: a fluid (as air) that has neither independent shape nor volume but tends to expand indefinitely . . . 2a: a gas or gaseous mixture with the exception of atmospheric air—not used scientifically b: a gas or gaseous mixture (as laughing gas or ethylene) used to produce anesthesia c: a combustible gaseous mixture (as for fuel or illumination) . . . 3 *slang*: empty boasting talk . . . 4: the state of having or an accumulation of gas in the digestive tract; *also*: distress caused by this 5: a substance (as a war gas or tear gas) whether gaseous, liquid, or solid under ordinary conditions that can be used to produce a poisionous, asphyxiating or irritant atmosphere . . . 6a: gasoline b: the accelerator of a gasoline powered vehicle . . ." *Webster's Third New Int'l Dictionary* 937 (1981).

and in various legal and industrial contexts. Congress' employment of the word in a statute creating power to reserve natural resource rights indicates that "gas" should be understood to mean a natural resource in the legal and techical context of its commercial exploitation. Even within this context, however, the word "gas" has meanings supporting both sides of this dispute.[6]

[6] A widely used manual of oil and gas law contains numerous definitions of the word gas. The first two are:

> " 'Any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperature and pressure conditions.' 30 C.F.R. §221.2(o) (1980). In the oil and gas industries, it means natural gas.
>
> " 'Twenty-three states define gas as all natural gas, including casinghead gas, and all hydrocarbons not defined as oil. Generally, the remaining states describe the definition of a gas well but do not specifically define natural gas.' 26 *Oil & Gas Compact Bull.* 55 (June 1967)."

8 H. Williams and C. Meyers, *Oil & Gas Law, Manual of Terms* 389 (1987).

The term "natural gas" also has various definitions within the industry:

> "Hydrocarbons which at atmospheric conditions of temperature and pressure are in a gaseous phase."

Id. at 588.

Nonetheless, one commentator writes:

> " 'The ordinary rarefied or gaseous hydrocarbons found in the earth are referred to generally as "natural gas." Noncombustible natural gases occurring in the earth, such as *carbon dioxide,* hydrogen sulfide, helium and nitrogen, are generally referred to by their proper chemical names. *Often, however, noncombustible gases are found in combination with combustible gases and the mixture is referred to generally as "natural gas," without any attempt to distinguish between the combustible and non-combustible gases.*' "

Id. (quoting Pruitt, *Mineral Terms—Some Problems in Their Use and Definition,* 11 Rocky Mtn. Min. L. Inst. 1, 17 (1966)) (emphasis added). In 1921, the United States Geological Survey considered "natural gas" to be a "mechanical mixture" of various hydrocarbons and nonhydrocarbon gaseous constituents. *See Helium Bearing Natural Gas,* 86 USGS Bull. 36, Dep't. of the Interior (1921).

Plaintiffs vigorously maintain that the structure of the relevant language of the 1914 Act reflects a clear intent to reserve only hydrocarbon gas and to convey all other gas in the land patent. In the 1914 Act, the word "gas" appears sandwiched between "oil" and "asphaltic minerals," assertedly two "fuel minerals,"[7] and after a listing of phosphate, nitrate, and potash, assertedly three "fertilizer minerals." It would make no sense, plaintiffs argue, for the drafter to insert "gas" within a grouping of fuel minerals if the word was intended to refer to noncombustible gases such as carbon dioxide. According to plaintiffs, Congress intended the courts to apply the principles of ejusdem generis[8] to limit the term "gas" to hydrocarbon gas.

This structural argument overwhelmingly supports the proposition that gas indirectly or directly valuable for fuel was intended to be reserved. Plaintiffs would have us infer, however, that Congress actually considered the combustible and noncombustible components of naturally occurring underground gas and expressed its intent to reserve only combustible gas by its choice of the sequence in which the reserved minerals were listed. This proposed interpretation immediately prompts us to ask why Congress did not merely reserve "fuel gas" in lieu of relying on ejusdem generis. The manipulability of the rule was well-recognized even during the era of the 1914 Act:

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[7] The phrase "fuel mineral" appears nowhere in the 1914 Act. Various executive officials referred to reservations of "fuel minerals" in the 1914 Act. *See* infra at 23.

[8] Ejusdem generis is an intrinsic aid to statutory construction "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A N. Singer, *Sutherland Statutory Construction* §47.17 (1984) (footnote omitted).

> "If we should apply the rule of ejusdem generis, what qualities or peculiarities of the specified type 'coal,' shall be considered in determining the classification intended by the use of the word 'mineral'? Are we to classify according to value? If so, can it be said that oil or gas on the one hand and coal on the other are of different kinds or species of minerals? If we classify as to use, is it not true that all three are used for fuel? Shall the classification be determined by the form, density, color, weight, value or uses of the particular species mentioned? Taking either value, use, or nature or origin as the basis of the classification mentioned, can we say that oil and coal do not belong to the same class? . . . Such evident difficulty in applying the rule of *ejusdem generis* to the terms of the reservation under consideration renders it an unsafe guide, and we do not believe any aid in the interpretation of the terms used in the reservation will be afforded by such rule."

Luse v. Boatman, 217 S.W. 1096, 1099 (Tex. Civ. App. 1919).

Indeed, no clear indication exists what classification method Congress would have intended the reader to use. The six enumerated substances constitute one class if the class is defined as "nonmetalliferous minerals." Plaintiffs' suggested subclasses of fuel and fertilizer minerals is another possibility.[9] Representative Scott

[9] This argument is undermined by the judicial rejection of the characterization of "oil" as a specific word. In *Brennan v. Udall*, 251 F. Supp. 12 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967), for example, the word "oil" in the 1914 Act was construed to include oil shale, a solid sedimentary rock containing kerogen rather than petroleum. *See also Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 711 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971) (rejecting characterization of "oil" as specific term operating to limit definition of "gas' in lease to combustible gas only); *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 327 (Ct. Cl. 1966) (refusing to apply ejusdem generis to "oil and gas").

(Footnote continued on following page.)

Ferris, the chairman of the House Committee on the Public Lands in 1914, appeared to have thought that each enumeration may have constituted a separate "class" of minerals. *See* infra at 24. The choice of class thus seems to depend primarily on the interpretive result one wants to reach, rather than on a clear indication of congressional intent.

Moreover, in *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 711 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971), we rejected the application of ejusdem generis in construing an oil and gas lease. Indeed, the rule of ejusdem generis has had "little application in cases dealing with oil and gas." R. Hemingway, *Law of Oil & Gas* 4-5 (West 1983 2d ed.). We conclude that the text of the 1914 Act gives no indication whether Congress intended to prevent carbon dioxide gas from passing to the patentee.

B.

We next address plaintiffs' historical analysis of the circumstances surrounding the enactment of the 1914 Act and related acts, employing materials from Congressional Reports and debates, as well as from the Department of the Interior and its subdivisions responsible for managing federal lands. They first

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Brennan and *Northern Natural Gas* also preclude plaintiffs' argument that no drafter of a statute would list five "specific" minerals and put the more generic term "gas" somewhere in between them. In our opinion in *Brennan*, we held that "oil" in the 1914 Act was to be broadly defined to include kerogen, a substance containing no oil. In *Northern Natural Gas*, we held that the words "oil" and "gas" have equal status. *See* 441 F.2d at 711. Other minerals enumerated in the Act are thus clearly not as "specific" as plaintiffs would have us believe.

contend that the 1914 Act's relationship to the Pickett Act of 1910 reflects Congressional intent to restrict the reservation of gas to hydrocarbon gas. As discussed above, the Pickett Act provided a procedure by which the Department of the Interior could withdraw lands from homestead entry. The 1914 Act provided for homestead entry onto these withdrawn lands, subject to a reservation to the United States in the enumerated resources "on account of which the land were withdrawn or classified or reported as valuable." 30 U.S.C. §121. The quoted language, maintain plaintiffs, reflects an intent to *limit* the scope of the enumerated substances to those deposits "on account of which the lands were withdrawn." *Id.* Because the lands in question purportedly were withdrawn "on account of" petroleum,[10] carbon dioxide gas deposits are excluded from the "oil and gas" reservations in plaintiffs' patents.

Plaintiffs' argument is unconvincing. First, plaintiffs point to no administrative fact-findings that *their lands* actually *were* the subject of petroleum withdrawals.[11]

[10] So-called "petroleum withdrawals" were common under the Pickett Act and were also part of the practice of the Interior Department prior to the passage of the Pickett Act. *See* supra at 4-5.

[11] In their Reply Brief at 6 n.2, plaintiffs assert that "oil permits" were what led to the reservation of "oil and gas" in plaintiffs' patents under the 1914 Act. The oil permits to which plaintiffs refer appear in the various patentees' waivers and consents to the 1914 Act's reservations in oil and gas in their patents. *see, e.g.*, rec., vol. II, at 181. These permits were considered permits for "oil and gas" by the Department of the Interior. *See id.* at 182. Although not entirely clear, these prospecting permits appear to refer to the Mineral Leasing Act of 1920's provisions allowing private persons to prospect for minerals owned by the United States. *See id.* at 189 (referring to "permit to prospect for oil and gas under the Act of February 25, 1920 (41 Stat. 437)"). As we discuss infra at 25-26, the Mineral Leasing Act defined gas broadly to include both hydrocarbon and nonhydrocarbon gases. Therefore, we do not believe these permits force a limiting construction on the reservations in the 1914 Act to hydrocarbon gas only. To the contrary, they tend to favor a construction of "gas" in pari materia with the Mineral Leasing Act.

The 1914 Act also applies to lands "classified or reported as valuable" for the six enumerated resources. *Id.* The IBLA noted that "[t]here is no evidence that the land involved herein was withdrawn, classified, or reported as valuable on account of carbon dioxide. However, the mineral reservations clearly embrace the term 'gas.' We must, therefore, presume that the land was either withdrawn, classified, or reported as valuable on account of 'gas.' " *Lanier*, 93 Interior Dec. at 70 n.6.

In addition, while there is no evidence that their lands were withdrawn *specifically* "on account of" carbon dioxide gas, evidence that the "gas" on account of which the lands were withdrawn, classified, or reported as valuable *excluded* carbon dioxide is also absent. It is true that such withdrawals were termed "petroleum" withdrawals in the Department's yearly reports to Congress, *see, e.g.*, Letters from the Secretary of the Interior to Congress dated Dec. 13, 1912 and Dec. 16, 1913, *supra*, but plaintiffs concede that the withdrawals encompassed oil *and* "gas." *See* Opening Brief at 19. Congress in the Pickett Act of 1910 excepted "gas" in withdrawn lands from "exploration, discovery, occupation and purchase" under federal mining laws. 36 Stat. 847. Plaintiffs provide us no reason for construing the term narrowly in the Pickett Act of 1910. Indeed, two years before the 1914 Act was passed, the Pickett Act was amended to exempt nonmetalliferous minerals, indubitably encompassing carbon dioxide gas. *See* 37 Stat. 497. We do not agree with plaintiffs that the Pickett Act somehow forces a limiting construction on the word "gas" in the 1914 Act. It is entirely plausible that Congress contemplated the raw natural gas stream from a gas well in both acts.

Plaintiffs next contend that Congress knowingly adopted the definition of gas then used by the sub-agencies of the Department of the Interior charged with the administration of federal lands. A 1913 treatise concerning the classification of federal lands published by the United States Geological Survey, for example, described the immediate purpose of classifying oil and gas land "to withhold from entry all lands containing valuable deposits of fluid hydrocarbons pending the enactment of adequate legislation providing for their disposition." Bulletin 537 at 117. Assuming that Congress adopted and approved this language, it reveals no clear intent to reserve *only* hydrocarbon gas.[12] Indeed,

[12] In support of its argument that Congress adopted this definition, plaintiffs cite to one comment by Representative Mondell, the 1914 Act's sponsor, in House debate on the 1914 Act. Representative Mondell stated:

> "[I]f land is withdrawn for oil, coal and gas, *the two being always coupled*, the reservation would be at the oil and the gas and the coal."

51 Cong. Rec. 10,493 (1914); rec., vol. II, at 22 (emphasis added).

In our view this statement again supports the proposition that fuel gas was the primary, if not the only, concern of Representative Mondell. It does not mean that he approved of the USGS publications on the subject. It also does not mean that he, or Congress for that matter, intended to convey all other types of gas to the patentee.

Were this statement given the literal import that plaintiffs suggest, certain types of fuel gas such as "dry gas" would pass to the patentee because it is not "coupled" with oil. *See* 8 H. Williams and C. Meyers, *Oil & Gas Law, Manual of Terms*, 283 (1987) (dry gas is gas produced from a stratum that does not contain crude oil). On the other hand, it was well known at the time that nonhydrocarbon gases often are "coupled" with oil. *See Mineral Resources of the United States*, 323-333 USGS Bull., Dep't. of the Interior (1911) (indicating composites of natural gas in California fields as including significant nonhydrocarbon constituents); *Helium-Bearing Natural Gas* 86 USGS Bull. 36 (nonhydrocarbon gases occur in most natural gas and are important constituents in some varieties). Perhaps because of these uncertainties Congress saw fit to reserve "gas" regardless of its chemical composition. Plaintiffs point to no legislative history dictating otherwise.

that same document reflects awareness that "oil and gas" may encompass more than hydrocarbons. For instance, the Bulletin defined oil and gas as being composed "*for the most part* of carbon and hydrogen." *Id.* at 112 (emphasis added). Although these other substances composing oil and gas remain unnamed, Congress was probably aware that while "gas" usually meant fuel gas, it also could mean noncombustible, naturally-occurring underground gases such as the carbon dioxide at issue here. *See, e.g., Mineral Resources of the United States,* 323-333 USGS Bull., Dep't of the Interior (1911) (showing gaseous components of natural gas fields in California, including carbon dioxide).

The Department of the Interior refers several times in connection with the entry acts to the reservation of "fuel minerals" and "fuel gases." For example, Franklin K. Lane, then the Secretary of the Department of the Interior, characterized coal, phosphate, oil, gas, potassium, and sodium as fuel and fertilizer minerals. *See* rec., vol. II, at 99 (Letter from Franklin K. Lane, Secretary of the Department of the Interior to Rep. Scott Ferris, Chairman of the House Committee on Public Lands (May 1, 1914) (concerning H.R. 16136, reserving minerals to United States)); *see also id.* at 116 (Letter from Franklin K. Lane, Secretary of the Interior to Sen. Henry L. Myers, Chairman of the Committee on Public Lands (Jan. 10, 1916) (concerning S. 777, referring to enumerated substances as fuel and fertilizer minerals)); *id.* at 141 (Letter from First Assistant Secretary of the interior A.A. Jones to Sen. Henry L. Myers, Chairman of the Committee on Public Lands (Sept. 16, 1914) (concerning S. 6484 extending reservations to Alaska and referring to definite policy of separate dispositions of "surface estates and mineral deposits in certain classes of important fuel and fertilizer minerals")).

Plaintiffs ask us to infer from these executively generated materials that Congress clearly adopted a narrow interpretation of gas. We note first that plaintiffs' citations from historical sources are selective. Other items of correspondence concerning the same subject matter simply enumerate the listed substances. *See, e.g.*, Letter from A.A. Jones, Assistant Secretary of the Interior to Rep. Scott Ferris, Chairman of the House Committee on Public Lands (Jan. 16, 1914); Letter from Franklin K. Lane to Rep. Scott Ferris, Chairman of the House Committee on Public Lands (Mar. 12, 1914). More significantly, the 1914 Act itself incorporated one of the language employed in the letters and documents to which plaintiffs cite. In fact, there is some evidence that some members of Congress rejected the Department's proposed characterization. In testimony concerning a 1914 bill to lease mineral deposits owned by the United States, the following colloquy between the Chairman of the House Public Lands Committee and the Director of the USGS took place:

> "Rep. Ferris: This bill purports to deal with six classes of deposits in the United States.
>
> Mr. Smith: You might make that simpler by saying there are two general classes of deposits, mineral fuels and mineral fertilizers.
>
> Rep. Ferris: I was following the wording of the bill."

Hearing before the House Committee on the Public Lands, House of Representatives, 63d Cong., 2d Sess., on H.R. 14094 (1914) at 16.

Most importantly, six years later in the Mineral Leasing Act of 1920, Congress again employed the word "gas" in an enumeration comparable to the 1914 Act,

granting authority to the Department of the Interior to lease "coal, phosphate, sodium, oil, oil shale, or gas" owned by the United States. 41 Stat. 437. The 1920 Act also provided that

> "the United States reserves the right to extract helium from all *gas* produced from lands permitted, leased or otherwise granted under the provisions of this Act .... *Provided further,* That in the *extraction of helium from gas produced from such lands,* it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof ...."

41 Stat. 438 (emphasis added). The emphasized language has meaning only if Congress understood "gas" to mean the raw gas stream from a well, including both combustible and noncombustible components. Aside from the snippets of legislative history such as those discussed above, plaintiffs offer no reason why the word "gas" in these two substantially contemporaneous and interrelated statutes should not be construed in pari materia. At the very least, the 1920 Mineral Leasing Act demonstrates that when Congress intended to legislate concerning naturally occurring underground gases in a generic sense, it chose the word "gas" with full knowledge that the word would be construed to mean combustible *and* noncombustible gases.[13]

[13] It is conceivable that Congress intended "gas" to mean hydrocarbon gas only in the 1914 Act, and then used the same word in the 1920 Mineral Leasing Act generically to mean naturally-occurring underground gases. However, two years after the enactment of the 1920 Mineral Leasing Act, Congress reserved "coal, oil or gas" in Alaska patents without qualifying or amending the reach of the term "gas." *See* Act of March 8, 1922, ch. 96, 42 Stat. 415 (codified as amended at 43 U.S.C. §§270-11 to 270-12), *repealed in part by* FLMPA §703(a), 90 Stat. 2790 (1976). Given the explicit concern over helium in the Mineral Leasing Act and the implicit

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Our review of legislative and historical materials surrounding the enactment of the 1914 Act fails to clear up the ambiguity in the word "gas" as employed in the 1914 Act. Plaintiffs point to nothing in these extrinsic sources even intimating that Congress has "directly addressed the precise question at issue," *Chevron*, 467 U.S. at 843, in favor of their proposed limiting construction. If anything, a comparison of the term "gas" as used in related statutes favors a generic construction of the term, although we believe it equally likely that Congress had no intent whatsoever concerning carbon dioxide gas.

IV.

Having concluded that Congress was silent on the question whether carbon dioxide is "gas" within the meaning of the 1914 Act, we next address plaintiffs' argument that we must not defer to the Department of the Interior's construction of the Act. Deference is not warranted, they argue, because there is no "longstanding and consistent agency policy of defining carbon dioxide to be a 'gas.' " Opening Brief at 35.

Until the inception of this dispute, the Department of the Interior had no occasion to determine explicitly whether carbon dioxide is "gas" within the meaning of

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assumption that "gas" included helium, it seems far-fetched indeed to conclude that Congress would have reserved fuel gas only in the 1922 Act. It also seems unlikely that Congress would consciously use "gas" to mean fuel gas in 1914, then use "gas" to mean naturally-occurring underground gases in 1920, and then revert to the narrow meaning in the Alaska gas reservations. That Congress would reserve fuel gas only in the contiguous United States and then reserve gas in the generic sense in Alaska without making itself more explicit seems equally irrational. The most rational reading is that Congress intended "gas" to mean the same thing in all three statutes.

the 1914 Act. Plaintiffs maintain that the determinative administrative interpretations of a statute vesting property rights are those contemporaneous with the passage of the Act, and that those interpretations make clear the Department's original understanding that only fuel gas was reserved. They argue that the Department's current construction of the word "gas" to include carbon dioxide conflicts with its earlier definitions, robbing the current construction of its entitlement to judicial deference. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (agency interpretation conflicting with earlier interpretation entitled to considerably less deference than a consistently held view); *Shoshone Indian Tribe v. Hodel*, 903 F.2d 784, 787 (10th Cir. 1990) (same).

To support their argument, plaintiffs refer us to Bulletin 537, concerning the classification of the lands of the United States. We have already discussed Bulletin 537, *see supra* at 21-22, and we think that it constitutes overwhelming evidence that gas in the Department's view meant "for the most part"[14] fuel gas, but not *only* fuel gas. Plaintiffs provide no conclusive or even persuasive support for their suggested negative inference that only fuel gas constituted gas in the early Department interpretations. It is equally plausible that the Department had in mind the raw natural gas stream from a gas well, the only significantly valuable component of which was fuel gas.

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[14] Other USGS Publications make it clear that the Agency considered carbon dioxide to be a *component* of natural gas. *See, e.g., Mineral Resources of the United States*, 323-333 USGS Bull., Dep't of the Interior (1911) (table entitled "The Composition of Natural Gas" includes hydrocarbons, carbon dioxide, and other gases).

This economic fact could well explain why in many Departmental publications the term gas was used mainly in the context of gas in association with oil. *See Petroleum Withdrawals and Restorations Affecting the Public Domain,* 623 USGS Bull. 59, Dep't of the Interior (1916) ("close analogy between the oil and natural gas industries, *at least as far as the production is concerned*") (emphasis added) (citation omitted)); *Bibliography of North American Geology for 1914,* 617 USGS Bull. 295, Dep't of the Interior (1915) (noncombustible gases occurring in oil fields generally not subject of analysis); *Useful Minerals of the United States,* 585 USGS Bull. 237, Dep't of the Interior (1914) (natural gas is mixture of gaseous hydrocarbons). These documents conflict with the Department's current interpretation concerning carbon dioxide only if we stretch their meaning to support the negative inference suggested by plaintiffs. Indeed, 617 USGS Bulletin, published in 1915, characterized ninety-one percent pure carbon dioxide gas as "natural gas." *See* 617 USGS Bull. at 203 (table entitled Analyses of Natural Gas From Farnham Dome Utah). We conclude that the Department's interpretation of the 1914 Act to include carbon dioxide gas in the Act's reservation of "gas" does not conflict with its interpretation of the word gas at the time of the Act's passage.

Plaintiffs, the government, and intervenors all cite to numerous agency definitions of "gas" issued over the years for various purposes and in various contexts. Plaintiffs argue that these definitions reflect the contradictory and inconsistent agency position on the definition of gas over time. The government and intervenors maintain that they represent the Department's long-standing and consistently held view

that "gas" includes carbon dioxide gas.[15] Several generalizations can be made about them. First, none of these definitions interpret the 1914 Act. Second, the definitions clearly encompassing noncombustible gases all interpret the Mineral Leasing Act which regulates the conveyance of gas deposits to which the United Staes holds title. Third, the narrower definitions plaintiffs cite concern specialized issues of regulatory jurisdiction, involve unrelated statutes, or are the products of internal memoranda or particularized factual circumstances. *See United Transp. Union v. Dole,* 797 F.2d 823, 831 (10th Cir. 1986) (Logan, J. concurring) ("judicial deference generally is reserved for agency views that have been

[15] The Department of the Interior, for purposes of the Mineral Leasing Act has defined "gas" broadly. *See, e.g.,* 55 Interior Dec. 502, 511, 521 (1936) (providing for royalty "on gas *including* inflammable gas, helium, *carbon dioxide* and all other natural gases and mixtures thereof" under Mineral Leasing Act) (emphasis added); 30 C.F.R. §221.2(o) (1942), currently codified at 43 C.F.R. §3000.0-5(a) (1989) ("gas" under Mineral Leasing Act is "any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperatures and pressure conditions"); 30 C.F.R. §206.151 (1989) (" '[g]as' means any fluid, either combustible or noncombustible, hydrocarbon or nonhydrocarbon, which is extracted from a reservoir and which has neither independent shape nor volume" for purposes of Bureau of Land Management's leasing of gas on Indian Lands).

In other statutory contexts, the definition of gas is arguably narrower. *See* 30 C.F.R. §259.002 (1989) (" 'Gas means natural gas as defined by the Federal Energy Regulatory Commission,' " for purposes of administering the Outer Continental Shelf Lands Act). The Federal Energy Regulatory Commission ruled in 1979 that the carbon dioxide at issue here was not "natural gas" for purposes of jurisdiction under the Natural Gas Act. *See Cortez Pipeline Co.,* 7 F.E.R.C. (CCH) ¶61,024 (1979); *see also* rec., vol. II, at 160 (memorandum from Solicitor of the Department of the Interior to the Secretary of the Department of Interior (dated April 9, 1931) noting that issuance of prospecting permits for carbon dioxide gas under Mineral Leasing Act could not violate oil and gas conservation policy of 1929).

reflected in *formal* pronouncements or have been known through other means for a long time" (emphasis added)).[16]

The law is clear that "great deference" is accorded "consistent and long-standing agency interpretations." *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1350 (10th Cir. 1987). This deference generally applies, however, to agency interpretations of the statute in question, where the interpreting agency is empowered to administer the statute. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965). In exceptional circumstances, such as where two different statutes were enacted substantially contemporaneously as part of a larger policy or program, or where one statute expressly or implicitly incorporates the language and policy of the other, we believe the agency's interpretation of the related statute should

[16] The rationale for disregarding internal memoranda in determining agency positions for purposes of deference is bound up with the reason for considering the consistency of agency views in the first place. In *Udall v. Tallman*, 380 U.S. 1, 16 (1965), Chief Justice Warren wrote that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." Part of the reason there for deferring to the Department of the Interior's construction of an Executive Order was that the interpretation had long been a matter of "public record and discussion." *Id.* at 17. The Court quoted an earlier case for its rationale:

> " '[G]overnment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.' "

Id. (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915)).

carry some weight so long as the same agency is empowered to administer both statutes. We have previously discussed the relationship of the Mineral Leasing Act and the series of acts, including the 1914 Act, reserving minerals subject to disposition under the 1920 Leasing Act. *See* supra at 8, 24-25. Based on this relationship, we think that the Department of the Interior's interpretations of the word "gas" in section 181 of the Mineral Leasing Act are entitled to some consideration in reviewing the same agency's interpretation of the word in the 1914 Act.

The definitions cited by plaintiffs interpret such temporally and factually distinct statutes as the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1356 (1982); *see* 30 C.F.R. §259.002 (1989); 30 C.F.R. §256.40(h) (1989), or involve separate statutory schemes administered by different agencies such as the scope of the Federal Energy Regulatory Commission's jurisdiction under the Natural Gas Act. *See Cortez Pipeline Co.*, 7 F.E.R.C. (CCH) ¶61,024 (1979). These wholly distinct interpretations of the word "gas" by agencies other than the Department of the Interior in these other contexts have no bearing on the Department's interpretation of the 1914 Act or of the related Mineral Leasing Act, and do not make the Department's practice internally inconsistent.[17] We are

[17] Plaintiffs also rely on 43 C.F.R. §2880.0-5(g) (1988), which defines "[o]il or gas" as "oil, *natural gas*, synthetic liquid or gaseous fuels, or any refined product produced therefrom." This regulation parrots the language in the Mineral Leasing Act's provisions governing rights-of-way for pipelines through federal lands. *See* 30 U.S.C. §185 (1988). It is by no mean as clear that this definition excludes carbon dioxide gas. Indeed, in *Exxon Corp.*, 94 Interior Dec. 139 (1987), the IBLA determined that the term natural gas includes naturally produced carbon dioxide gas within the meaning of 30 U.S.C. §185 and 43 C.F.R. §2880.0-5(g). This language, in any event, in no way renders internally inconsistent the Department of the Interior's forty-five year old interpretation of "gas" *deposits* within the meaning of section 181 of the Mineral Leasing Act.

also not persuaded that the Interior Department memoranda cited by plaintiffs suffice to alter substantially the Department's longstanding *publicly-held* view as reflected in the regulations governing the leasing of oil and gas deposits. We conclude that the interpretation at issue is consistent with the Department's interpretation of the word "gas" in related legislation. Some deference to the Department's interpretation under *Chevron* is therefore appropriate.

V.

We now must consider whether the Department of the Interior's construction of the 1914 Act is a permissible one. *Sullivan*, 110 S. Ct. at 964. To affirm the Department's decision, we "need not conclude that the agency construction was the only one it permissibly could have adopted," nor must it accord with "the reading [we] would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Rather, we must determine whether it is " 'rational and consistent with the statute,' " *Sullivan*, 110 S. Ct. at 964 (quoting *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987)), taking into account the fact that a consistent and long-standing administrative interpretation of "gas" *in the 1914 Act* is lacking.

The Department's inclusion of carbon dioxide gas within the 1914 Act's reservations certainly does not offend the statute's plain language, which simply refers to "gas."[18] Plaintiffs attempt to give this word a limiting

[18] Nonfuel gases have been determined to be "gas" within the meaning of various other statutes in the face of arguments that the term "gas" referred only to fuel gas. *See, e.g., Reich v. Commissioner*, 454 F.2d 1157, 1158 (9th Cir. 1972) (geothermal steam is a "gas" within meaning of Internal Revenue Code provision providing depletion allowance for oil and gas wells); *Amoco Prod. Co. v. Wyoming*, 751 P.2d 379, 383 (Wyo. 1988) (term "natural gas" in state excise tax statute includes "all gases that occur naturally in gas produced from drilled wells").

construction through the use of legislative and other historical materials. Our own search through these materials revealed no clear congressional intent to exempt carbon dioxide or any other naturally occurring underground gas from the statutory authorization to reserve "gas." Accordingly, we will defer to the IBLA's interpretation unless it is inconsistent with the purpose and policy of the 1914 Act.

According to plaintiffs, "[t]he purpose of the 1914 Act was to convey all minerals except these carefully enumerated fuel and fertilizer minerals on account of which the land had been specifically withdrawn." Opening Brief at 27. While this characterization is not wholly inaccurate, it is somewhat incomplete. In enacting the 1914 Act, Congress was attempting to accommodate two concerns: (1) to prevent the mismanagement and waste that would occur if certain valuable resources deemed necessary for the country's economic development fell into the wrong private hands, and (2) to fully realize the nation's agricultural potential through the settlement and development efforts of homestead entrants. *See generally United States v. Union Oil Co.*, 549 F.2d 1271, 1274-76 (9th Cir.) (describing events leading to enactment of 1914 Act and related acts), *cert. denied*, 434 U.S. 930 (1977).

Plaintiffs repeatedly point out that, in marked contrast to the Stock Raising Homestead Act of 1916, 43 U.S.C. §§291-302, the 1914 Act reserved only the six enumerated classes of minerals instead of the entire mineral estate. This feature of the 1914 Act presumably resulted from political compromise to overcome the opposition to general reservations by representatives of certain Western states. *See, e.g.*, 51 Cong. Rec. 10493 (1914) (colloquy between Representative Mondell of

Wyoming arguing for limited mineral estate and Representative Mann of Illinois suggesting a general mineral reservation). Plaintiffs extrapolate from this feature of the 1914 Act their argument that its reservations should be very narrowly construed to preserve its purpose to convey a limited mineral estate to the homestead entrant or purchaser of the surface estate.

The short answer to plaintiffs' argument is that a substantial mineral estate passes to the surface holder regardless of how the express reservation of "gas" in the Act is construed. All metalliferous minerals, as well as those nonmetalliferous minerals not enumerated or reserved, pass to the landowner.[19] Moreover, Congress failed to modify the term "gas" in the 1914 Act. Finally, plaintiffs fail to give proper weight to Congress' general purpose to ensure proper management and disposition of the reserved minerals, including gas, by retaining them in the public domain.

Part of this general purpose was to lay the groundwork for the rational disposition of these resources. Accordingly, the 1914 Act provided for "the right to prospect for, mine, and remove the same, such deposits *to be subject to disposal by* the United States only as shall be hereafter expressly directed by law. . . . Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the

[19] Plaintiffs hotly dispute intervenors' argument that carbon dioxide gas should be reserved because no specific intent exists to exclude it. This conceptual approach is flawed, plaintiffs contend, because requiring specific intent to exclude would effectively reserve all minerals the exclusion of which is not made clear in the language or the legislative history of the 1914 Act. We disagree. Specific intent to exclude such metalliferous metals as gold, silver and copper, etc. exists because they are *not enumerated in the act.* "Gas," in contrast, *is* enumerated. Intervenors refer, quite obviously, to the absence of specific intent to place a limiting construction on the word gas.

same." 30 U.S.C. §122 (emphasis added). When construing the 1914 Act, the law relating to the conveyancing, prospecting for, and exploitation of the reserved substances should be given due regard. In this respect, at least, analyses relating to similar problems in construing private mineral conveyances are instructive.

In *Northern Natural Gas Co.*, 441 F.2d 704, we considered a question in the context of an "oil and gas" lease closely analogous to the problem we now confront. The landowner lessors there contended that helium, a noncombustible gas, did not pass to the lessee. *Id.* at 710. In rejecting the lessors' contention that only combustible gas was meant by the term "gas," we looked first to determine if the parties had a "specific intent" concerning the disposition of helium gas. We concluded that the parties "could not have had any intent with regard to it," *id.* at 714, because when the leases were entered into, helium was considered an impurity in the natural gas stream. We then tried to determine the parties' general intent. We observed that:

> "General intent should be discovered not by defining and redefining the terms used but by considering the purposes of the grant in terms of enjoyment of the rights created.
>
> ". . . .
>
> "In our opinion general intent is closer to original intent than is specific intent which blossoms when a component previously regarded as an impurity becomes valuable. The discovery of the use and value of a component does not expand the grant but the expansion of that discovery into tangible value makes more certain the specific object of the general grant. We conclude that, absent specific reservations, the grant of gas by the leases covered all components of the gas, including helium."

Id. at 714-15.

The analysis of the leases in *Northern Natural Gas*, maintain plaintiffs, has no application to the construction of a statute such as the 1914 Act. We disagree. The 1914 Act envisioned that the reserved estates eventually could be the subject of conveyances such as leases. Moreover, the leases in *Northern Natural Gas* and the reservations in the 1914 Act each create split mineral estates with unique problems common to both. Finally, at its simplest level the 1914 Act operates to regulate executive conveyances of real property owned by the United States. At bottom, both *Northern Natural Gas* and the dispute here concern what was contemplated in a conveyance of "gas."[20]

We think it fair to say that Congress' general intent in creating the reservation was to put the United States government in a position to convey the same rights a lessor of "oil and gas" could convey to a lessee to enable the latter to "prospect for, mine, and remove the same." 30 U.S.C. §122. Courts consistently have held that a gas lessee, absent an explicit reservation, is entitled to the raw natural gas stream, whatever its chemical makeup. *See Northern Natural Gas*, 441 F.2d at 715; *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 326 (Ct. Cl. 1966).

The analysis in *Northern Natural Gas* and *Navajo Tribe* is nonetheless inapposite, argue plaintiffs, because here the carbon dioxide gas is over ninety-nine percent pure, while in *Northern Natural Gas* and *Navajo Tribe* the noncombustible elements were commingled with the combustible elements. We do not think a rule making

[20] If anything, plaintiffs' distinction between the private conveyances in *Northern Natural Gas* and the federal patent conveyances regulated by the 1914 Act does not favor their position. Land grants are usually construed favorably to the United States. *See Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59-60 (1983).

property rights to different chemical components of natural gas dependent on the level of purity (or impurity) of the gas would aid in the rational development of the law of mineral resource rights. Moreover, as the court in *Navajo Tribe* wrote:

> "Although the parties to the lease may have been thinking mainly of fuel-type gases, it is still more realistic to presume that the grant included not only hydrocarbons but the other gaseous elements as well. It follows that, whether its percentage was high or low, the helium component was part of the 'gas deposit' which passed to the lessee."

Navajo Tribe, 364 F.2d at 326. This reasoning applies equally well to our view of Congress' intent when it reserved "gas" in the 1914 Act.

Other factors influence our conclusion that the Department of the Interior's construction of the 1914 Act is consistent with its purpose. The value of the carbon dioxide gas derives for all practical purposes from its function as a pressurizer and solvent upon being re-injected into "depleted" oil wells. In accord with the 1914 Act's purpose of conserving the nation's fuel resources, reservation of the gas at issue here operates to preserve increasingly scarce domestic sources of fuel. Indeed, a contrary construction would undermine the fuel conservation purpose of the 1914 Act.

Hydrocarbon gas and the carbon dioxide gas here in question also serve parallel functions to some extent, a fact well known during the era of the 1914 Act's enactment. *See* J. Lewis, *Methods for Increasing the Recovery from Oil Sands,* 148 Bureau of Mines Bull. 90, Dep't of the Interior (1917) (concerning reinjection of hydrocarbon gas and other gases into wells as a method to increase oil recovery). Indeed, "[t]he principle of

increasing production [of oil] by forcing air *or any other gas* through the oil sand, and many other details of operation, [were] covered [as of 1917] by U.S. patents." *Id.* at 36 n.a (emphasis added). In *Utilities Prod. Corp. v. Carter Oil Co.*, 72 F.2d 655 (10th Cir. 1934), we held that an oil lessee had the right to use so-called "dry" hydrocarbon gas to increase oil production. We wrote:

> "The use of gas for repressurizing was *so widely known* in the industry by 1917 . . . that the Interior Department had prepared and issued a bulletin of 120 pages on the subject. Repressurizing was in *common use* in the Appalachian fields in *1916.*"

Id. at 659 (emphasis added). To the extent that the value of "gas" derives, or derived, from its utility in oil recovery, its combustibility is irrelevant.

We have no way of ascertaining that Congress was aware of the value of gas in oil recovery, or whether it intended to reserve it for this purpose. However, had Congress been aware of the value of carbon dioxide gas in the recovery of oil, it strains credulity to conclude that Congress would have created the separate gas estates plaintiffs suggest. We therefore conclude that the Department of the Interior's construction of the 1914 Act's reservation of "gas" to include carbon dioxide gas is "reasonable in light of the statutory purpose." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455 (1978).

VI.

The district court's order is AFFIRMED.

Judgment of the United States Court of Appeals for the Tenth Circuit Dated September 20, 1990

SUPREME COURT OF APPEALS
FOR THE TENTH CIRCUIT

88-2349

JOE AULSTON and LOLA AULSTON, HOWARD L. BARTLEY, ELSIE BARTLEY, VIRGINIA BASSETT, ROGER A. BIGLER, Trustee, BARBARA BURKE, TRUSTEE for PAUL WILSON Estate, STANLEY E. BREWER, REGINA BREWER, CHARLES H. BROUGHER, BESSIE C. BROUGHER, RUSSELL D. BROWN, LEON CASSADAY, FLOSSIE E. CASSADAY, FRED G. CLINE, VIRGINIA CLINE, MICHAEL T. COKER, FRANKIE J. COKER, W.T. COKER, EDNA B. COKER, DENVER DALY, FLORENCE DALY, H.L. DUNCAN, THELMA DUNCAN, L.E. FRAKA, WANDA FRAKA, JOE P. FULKS, THELMA B. GARWOOD, RAYMOND G. GERLACH, JANET G. GERLACH, R.C. GERLACH, LOIS GERLACH, JAMES D. HARRIS as General Partner for Harris Limited Partnership, HARRIS LIMITED PARTNERSHIP, HAROLD F. HENSLEY, GEORGE L. HERREN, VIOLA HERREN, OLIVE V. HODAPP, ROBIN R. HOLLEN, Jr., BETTY J. HOLLEN, GLEN C. HUDGEONS, LOIS HUDGEONS, LORETTA B. HUNTER, JERRY HUSKEY, PAT HUSKEY, GARY HUSKEY, CARMEN IVES, IVES FARMS, INC., ROGER D. IVES, SUSAN IVES, SHERYL A. IVES, W.L. LANCASTER, LOIS LANCASTER, LANIER FARMS, INC., ROBERT D. LANIER, personally and

as President of LANIER FARMS., RHODA E. LEGG, IVA LINDBACK, MILDRED MAGGART, O. WAYNE MAGNESS, JEAN MAGNESS, LENA MARRS, OSCAR J. MARTIN, WANETA MARTIN, LAWRENCE MCGRATH, NANCY McGRATH, EDMUND L. MURPHY, CAROLINE MURPHY, ROBERT L. MUSTOE, IVAN W. NEELY, ELIZABETH ANN NEELY, HAZEL J. NEELY, DEE RENAY NEELY, PHYLLIS C. NICHOLS, IRVING L. NORTON, DANA NORTON, LEROY W. OLIVER, ELLEN OLIVER, TROY OLIVER, SHORLENE OLIVER, TOMMY W. PEDIGO, IMA JEAN PEDIGO, GALA FERN POCK, JOHN E. POCK, RITA L. POCK, ALBERT S. PORTER, H.L. POSEY, URSEL PRIBBLE, LOUISE PRIBBLE, CLIFFORD D. RAGSDALE, EDITH L. RAGSDALE, GRADY RAGSDALE, JEAN RAGSDALE, WAYNE A. RAMSEY, GLADYS E. RAMSEY, JOE F. RANDOL, LOIS J. RANDOL, DAISY M. REED, JOHN B. REED, HENRY S. ROWEN, BEVERLY ROWEN, BEATRICE G. SELIG, W.E. SPEER, PATSY SPEER, THERON O. STORY, JIM TEBBS, WILLIAM A. THOMPSON, JR., CLARENCE R. UPTAIN, LULA BELLE UPTAIN, LLOYD S. WALLACE, PAT WARREN, RUBY WARREN, WILLIAM WASCHKE, VIOLET WASCHKE, ERNEST WATKINS, GENEVA WATKINS, BILLY D. WATSON, DONALD H. WHITE, ISABELL M. WHITE, HENRY M. WHITE, GOLDIE WHITE, BRAD E. WHITE, PAMELA KAY WHITE, WAYNE E. WHITE, BESSIE M. WHITE, DOROTHY F. WILBANKS, AARON C. WILLIAMS, ARTHUR WILSON, ESTHER WILSON, MARIE WILSON, CLARA A.

(Additional Plaintiffs-Appellants.)

WOODMANSEE, RODGER D. WORTHY, ELIZABETH ANN WORTHY, ROBERT YOUNG and OLIA YOUNG,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; DONALD HODEL, in his Official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; ROBERT R. BUFORD, in his official capacity as Director of the U.S. Bureau of Land Management; NEIL MORCK, in his official capacity as Colorado State Director of the Bureau of Land Management,

Defendants-Appellees.

SHELL WESTERN E&P, INC.; CONOCO, INC.; VINCENT J. DUNCAN; RAYMOND T. DUNCAN; ELECTRA INVESTMENT; SYNERGY EXPLORATION, CO.; GULF OIL CORP; MOBIL PRODUCING TEXAS/NEW MEXICO; MCO RESOURCES, INC.; ESTATE OF WALTER DUNCAN; TIDELANDS ENERGY CO.; UNIVERSAL RESOURCES CORPORATION; LENDON CO.; DUNCAN ENTERPRISES, INC.; JUSTIN R. MEYER; BARBARA L. MEYER; PHILLIPS OIL CO.,

Intervenors-Appellees.

JUDGMENT
Entered September 20, 1990

Before HOLLOWAY, *Chief Judge*, SEYMOUR, MOORE, *Circuit Judges.*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

ROBERT L. HOECKER
ROBERT L. HOECKER, Clerk.

APPENDIX B

Order of the United States District Court
For the District of Colorado
Dated August 4, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-F-1144

FILED
United States District Court
Denver, Colorado
AUG. 4 1988
JAMES R. MANSPEAKER, Clerk

JOE AND LOLA AULSTON, *ET AL.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Defendants,

and

SHELL WESTERN E&P, *ET AL.*,
Intervenors.

ORDER

Sherman G. Finesilver, *Chief Judge*

This matter comes before the court on appeal of a decision by the United States Department of Interior Board of Land Appeals (IBLA). The parties have fully

briefed the issues involved and the case is ripe for final adjudication. The court has reviewed the administrative record, the parties' written submissions and the applicable law. For the reasons stated below, the decision of the IBLA is AFFIRMED.

I.

This case involves a dispute between the United States and plaintiffs over the ownership of carbon dioxide on land situated in Dolores and Montezuma Counties, Colorado. The land is situated near the McElmo Dome (Leadville) Unit. Plaintiffs are patentees or successors of patentees who hold title to the land pursuant to the Act of July 17, 1914, *as amended*, 30 U.S.C. §121. Intervenors are holders of oil and gas leases on the land.[1] Plaintiffs seek judicial review of an IBLA decision affirming a Bureau of Land Management (BLM) determination that the government's reservation of oil and gas on the lands included carbon dioxide. *Robert D. Lanier, et al.*, 90 IBLA 293 (Feb. 20, 1986).[2]

II.

In reviewing an agency's statutory interpretation, we first must determine whether Congress has expressed an intent on the issue. If the statute is silent or ambiguous, we will uphold the agency's interpretation if

[1] We outlined the procedural history of this case in our Order of January 11, 1988. In that order, we denied intervenors' motion to dismiss on statute of limitations grounds. In their brief, intervenors raise this issue again. We affirm our earlier decision.

[2] Plaintiffs are also appealing an IBLA decision entitled *Irving L. Norton, et al.* (November 27, 1987). That decision merely reaffirmed the *Lanier* holding.

it is "based on a permissible construction of the statute." *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984). A court may not substitute its judgment for the reasonable interpretation of an agency. *Id.* at 844.

Plaintiffs hold title to the lands pursuant to 30 U.S.C. §121 which provides, in relevant part:

> Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine and remove the same.

The question is whether carbon dioxide is a "gas" within the meaning of the statute and, consequently, whether this interest is reserved to the United States.

The IBLA relied on several factors in reaching its decision. First, it is clear that under the usual definitions, carbon dioxide is a gas, *Lanier,* 90 IBLA at 302. Plaintiffs contend the Act makes a distinction between hydrocarbon and nonhydrocarbon gases. At the time of the Act's passage, Congress was not aware of carbon dioxide's commercial value. Accordingly, no specific intent to exclude carbon dioxide was likely. *Id.* at 302-03.

Plaintiffs essentially argue that Congress' silence on the issue creates a negative inference that carbon dioxide was to be excluded from the statutory definition of

"gas." This contention has been rejected in similar cases. *See Northern Natural Gas Co. v. Grounds,* 441 F.2d 704 (10th Cir. 1971); *Navajo Tribe of Indians v. United States,* 364 F.2d 320 (Ct. Cl. 1966). *Se also Brennan v. Udall,* 251 F.Supp. 12 (D.Colo. 1966), *aff'd,* 379 F.2d 803 (10th Cir.), *cert. denied,* 389 U.S. 975 (1967) (finding that the term "oil" includes oil shale). The IBA agreed with the reasoning of these cases. *Lanier,* 90 IBLA at 306.

The IBLA also found that the Department of Interior has consistently included carbon dioxide as a gas. *Id.* at 307. For example, since 1942, the Department has defined gas as "any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarified state at ordinary temperature and pressure conditions." *See* 43 CFR 3000.0-5(a). Judicial deference to an agency interpretation is particularly compelling when supported by longstanding practice. *King v. Berglund,* 517 F.Supp. 1363, 1368 (D.Colo. 1981).

Another factor we find important is that Congress has never amended the statute to correct the agency's interpretation. This constitutes implicit legislative approval of the Department's construction of the statute. *See Commodity Futures Trading Comm'n v. Schor,* 106 S.Ct. 3245, 3255 (1986). In fact, there is a paucity of evidence indicating Congress even considered this question.

In the absence of clear Congressional intent, we accord deference to a reasonable statutory interpretation. We find the IBLA decision does not violate Congressional intent or the spirit of the statute.

ACCORDINGLY, the IBLA decision finding carbon dioxide to be reserved to the United States is AFFIRMED.

DATED this 4 day of August, 1988, at Denver, Colorado.

BY THE COURT:

SHERMAN G. FINESILVER
Sherman G. Finesilver, *Chief Judge*
United States District Court

APPENDIX C

IBLA Decision

[90 IBLA 293] In Reply Refer To:
(Logo)

United States Department of the Interior

Office of Hearings and Appeals
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

ROBERT D. LANIER, *ET AL.*

IBLA 85-271, 84-814

Decided February 20, 1986

Appeals from separate decisions of the Colorado State Office, Bureau of Land Management, dismissing private contest complaint (Contest No. 722), and denying application for recordable disclaimer of interest in lands, C-39463.

Affirmed.

1. Act of July 17, 1914—Federal Land Policy and Management Act of 1976: Disclaimers of Interest—Homesteads (Ordinary): Mineral Reservation—Oil and Gas Leases: Lands Subject to—Patents of Public Lands: Reservations

   A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, *as amended*, 30 U.S.C. §121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

APPEARANCES: Stephen H. Muse, Esq., San Antonio, Texas, for appellants, Ellen V. Gross, Esq., Houston, Texas, Ted P. Stockmar, Esq., and Marla Williams, Esq., Denver, Colorado, for Shell Western E & P, Inc.; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

[90 IBLA 294] OPINION BY
ADMINISTRATIVE JUDGE GRANT

This case involves a dispute between the United States and Robert D. Lanier and others (appellants herein) concerning ownership of the carbon dioxide (CO_2) underlying certain land situated in Dolores and Montezuma Counties, Colorado, which had been patented to appellants or their predecessors in interest pursuant to section 1 of the Act of July 17, 1914, *as amended*, 30 U.S.C. §121 (1982), with a reservation to the United States of deposits of "gas." The land is situated either within or in close proximity to the McElmo Dome (Leadville) Unit, of which Shell Western E & P, Inc. (Shell Western) is the unit operator. Carbon dioxide was discovered underlying appellants' land in the 1950's.

Appellants have appealed from two decisions of the Colorado State Office, Bureau of Land Management (BLM), dated July 27, 1984 (IBLA 84-814), and December 17, 1984 (IBLA 85-271). The appeals were consolidated for decision by order of the Board dated February 19, 1985.[1] In its July 1984 decision, BLM

[1] The names of the appellants, as well as the affected lands, are set forth in Exhibit 1 attached to the December 1984 BLM decision.

dismissed appellants' private contest complaint (Contest No. 722) challenging the claim of the United States to the carbon dioxide underlying appellants' land. In its December 1984 decision, BLM adjudicated appellants' claim to the carbon dioxide in an application for a recordable disclaimer of interest (C-39463) under section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §1745 (1982). The latter BLM decision denied the claim and rejected a request to place revenues from carbon dioxide leases in escrow.

[90 IBLA 295] On January 9, 1984, appellants submitted a "claim" for the rights to the carbon dioxide underlying approximately 20,000 acres of land owned by them.[2] Appellants stated the carbon dioxide is 99 percent pure and occurs in a liquid state. Appellants asserted

[2] BLM states in its December 1984 decision that appellants' amended claim includes 20,931.43 acres, of which 20,043.39 acres were patented under the Act of July 17, 1914, with a reservation of oil and gas to the United States. The lands patented under the 1914 Act are at issue in this appeal. The reasons for rejection of the claim as to the balance of the lands are set forth in footnote 4 below.

Of the lands patented under the 1914 Act, BLM states that 15,742.01 acres are situated within the McElmo Dome (Leadville) Unit. The McElmo Dome (Leadville) Unit embraces a total of 203,234.26 acres in Dolores and Montezuma counties in southwest Colorado, of which approximately 154,638.98 acres contain Federal oil and gas. The decision found all of the land claimed by appellants within the unit to be embraced in existing Federal oil and gas leases. BLM further stated that the "primary purpose" of the unit is to extract carbon dioxide from the Mississippian Leadville formation and to transport it "by pipeline to oil fields in Texas for injection [into existing wells] to aid recovery of the remaining reserves." The BLM decision disclosed that the carbon dioxide was discovered within the unit "about 1950" and "[d]uring the 1970's, Shell Oil Company and Mobil Oil Corporation formed seven exploratory units, [which in turn formed the basis for the present unit,] for [the] development of anticipated CO_2 reserves in the area."

that the United States had improperly leased these rights to Shell Oil Company and others and that the McElmo Dome (Leadville) Unit agreement, dated August 24, 1982, improperly included carbon dioxide in its definition of unitized substances. Appellants requested BLM to "disclaim all right, title and interest" in the carbon dioxide, to account for "all [past] royalty payments or other proceeds from the sale of the carbon dioxide" attributable to their land, and to place future royalty payments or other proceeds in escrow, in accordance with section 28 of the unit agreement. In support of their claim, appellants argued that section 1 of the Act of July 17, 1914, did not authorize the reservation of carbon dioxide to the United States in patents issued under the Act and that the United States did not reserve carbon dioxide when issuing such patents. Appellants submitted numerous documents in support of their arguments.

[90 IBLA 296] On July 3, 1984, appellants filed a private contest complaint pursuant to 43 CFR 4.450, challenging the title of the United States to the carbon dioxide involved herein. Appellants stated that the complaint was "in accordance with the Order of Judge Kane, U.S. District Court for the District of Colorado, dated March 25, 1981." In that order, styled *Dean Ives v. United States*, Civ. No. 80-K-705 (D. Colo. Mar. 25, 1981), the court dismissed a suit challenging the title of the United States to the carbon dioxide involved herein, in part because the plaintiffs had failed to exhaust their administrative remedies by pursuing their claim before the Department of the Interior.

In its July 1984 decision, BLM dismissed appellants' private contest complaint because private contests cannot be brought against the United States under 43 CFR 4.450. BLM also noted the case involved the question of whether carbon dioxide was a reserved mineral under section 1 of the Act of July 17, 1914, which, as a matter of law, was properly resolved in an adjudication of appellants' previously filed "claim."

In the statement of reasons for appeal from the July 1984 BLM decision, appellants state they filed the private contest complaint because they felt constrained to do so by the court order in *Ives*.[3] On August 27, 1984, BLM filed a motion for an extension of time to file an answer to appellants' statement of reasons, noting that BLM would soon issue a decision denying appellants' "claim" and requesting that any appeal from the anticipated [90 IBLA 297] decision be consolidated with the earlier appeal. BLM also recognized appellants were "forced" to appeal the dismissal of their contest complaint in order to avoid being "foreclosed, on the issue of title to carbon dioxide for failure to appeal." On August 31, 1984, appellants filed a response to BLM's motion, essentially acknowledging that their appeal from the July 1984 BLM decision was a protective appeal. In view of the fact that BLM has since acted upon appellants' claim, thus providing an appropriate forum

[3] The court order referred to the private contest regulations at 43 CFR Part 4, Subpart E, in noting the availability of an administrative forum for determining whether carbon dioxide is a gas reserved in a patent under the Act of July 17, 1914, 30 U.S.C. §121 (1982). However, as noted below, we regard appellants' appeal from the December 1984 BLM decision as the appropriate administrative forum for addressing appellants' claim.

for consideration of the essential controversy in the case (*i.e.*, who holds title to the carbon dioxide under the Act of July 17, 1914) and recognizing the inappropriateness of a private contest to quiet title as against the United States (*see* 43 CFR 4.450-1), we hereby affirm the July 1984 BLM decision dismissing appellants' private contest.

In its December 1984 decision, BLM concluded that the United States holds all right, title, and interest to the carbon dioxide in lands patented under the Act of July 17, 1914, by reason of a reservation of oil and gas to the United States. As a basis for the decision BLM relied on two memoranda issued by the Office of the Regional Solicitor, dated July 12, 1979, and July 26, 1984, and a memorandum issued by the Office of the Solicitor, dated July 20, 1984. Treating appellants' respective claims as a single consolidated application for a recordable disclaimer of interest in the carbon dioxide, BLM denied the application.[4] BLM also found that any

[4] BLM further stated the application was properly treated as 140 separate applications, all of which were subject to the "recently issued regulations" set forth at 43 CFR Subpart 1864 (49 FR 35297 (Sept. 6, 1984)), including payment of filing fees and processing costs. However, BLM concluded that appellants would not be required to comply with these regulations, unless they were successful on appeal, because BLM had substantially adjudicated their application prior to promulgation of the regulations.

BLM also noted that, with respect to portions of the claims of particular appellants, the application for a recordable disclaimer of interest was subject to rejection because the United States had either clearly conveyed its mineral interest or retained that interest. BLM stated the following land had been patented with no mineral reservation: lot 2, sec. 4, T. 37 N., R. 19 W., sec. 16, T. 38 N., R. 16W.; and the NE ¼ sec. 1, T. 38 N., R. 19 W., New Mexico

(Footnote continued on following page.)

doubts [90 IBLA 298] regarding the invalidity of appellants' claim were resolved by the "severe administrative consequences" of a finding of validity, noting the Department has "for at least 40 years" considered oil and gas leases to convey carbon dioxide. BLM stated that a finding of validity would, for example, cloud the title of existing leases, especially those held by the production of carbon dioxide, and complicate the issuance of leases where the land underlying portions of those potential leases had been patented under the Act of July 17, 1914. BLM concluded: "Absent a clear, positive basis for a determination that the landowner is the owner of the CO_2, the resulting complications should weigh in favor of ownership by the United States of America."[5] Finally, BLM rejected appellants' request to account for or to place in escrow "revenues attributable to the carbon dioxide in the claimed lands."

(Footnote continued from preceding page.)

Principal Meridian, Colorado. BLM stated the following land had not been patented: W ½ SW ¼ sec. 17, T. 37 N., R. 19 W., New Mexico Principal Meridian, Colorado.

BLM also noted that, with respect to a portion of the claim of one appellant, the patent from the United States had, in addition to reserving oil and gas under section 1 of the Act of July 17, 1914, reserved coal and other minerals under section 9 of the Stock-Raising Homestead Act, *as amended*, 43 U.S.C. §299 (1982). BLM stated this additional reservation was probably due to an inadvertent mistake and it would adjudicate the claim based on the reservation under the 1914 Act. However, it reserved the right to adjudicate the claim under the Stock-Raising Homestead Act. BLM indicated the following land was affected by this dual reservation: SE ¼ NE ¼, N ½ SE ¼ and SE ¼ SE ¼ sec. 8, T. 39 N., R. 19 W., New Mexico Principal Meridian, Colorado.

[5] BLM states that, in view of these complications, it reserves any procedural defenses it may have against appellants' individual claims, including laches, estoppel, or the statute of limitations.

[90 IBLA 299] Section 315(a) of FLPMA, 43 U.S.C. §1745(a) (1982), provides, in relevant part, that the Secretary of the Interior may issue a recordable disclaimer of interest "in any lands * * * where the disclaimer will help remove a cloud on the title of such lands and where he determines * * * a record interest of the United States in lands has terminated by operation of law or is otherwise invalid." Thus, the Secretary, and his delegated representative, BLM, have the discretionary authority to issue a recordable disclaimer of interest if it is determined that certain lands are "not lands of the United States or that the United States does not hold a valid interest in the lands." 43 CFR 1864.0-1. The term "lands" includes "interests in lands." 43 CFR 1864.0-5(e). Hence, BLM may properly consider whether to issue a recordable disclaimer of interest with respect to the carbon dioxide located beneath the lands owned by appellants. The crucial question is whether carbon dioxide was an interest reserved to the United States when it issued patents to the land pursuant to section 1 of the Act of July 17, 1914. This question requires that we examine the meaning of the Act.

[1] Section 1 of the Act of July 17, 1914, *as amended*, 30 U.S.C. §121 (1982), provides, in relevant part, that:

> Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title *with*

> *a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable,* together with the right to prospect for, mine, and remove the same. [Emphasis added.]

[90 IBLA 300] Section 3 of the Act of July 17, 1914, 30 U.S.C. §123 (1982), provides that the appropriate mineral reservation will also be included in a patent where entry is made prior to classification, withdrawal, or reporting of the lands "as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals." In the present case, the patents to appellants or their predecessors in interest contain a reservation of the oil and gas, in accordance with these statutory provisions. The question, therefore, is whether carbon dioxide comes within the scope of the term "gas" as used in the Act of July 17, 1914.[6]

It is clear that under normal atmospheric pressure and temperature carbon dioxide is a "gas" in the sense that it has neither independent shape nor volume but tends to expand indefinitely. Bureau of Mines, U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and*

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[6] Appellants argue on appeal that the mineral reservation under the Act of July 17, 1914, could only encompass those minerals which, prior to patent, specifically led to the withdrawal, classification, or reporting as valuable of the land embraced therein. There is no evidence that the land involved herein was withdrawn, classified, or reported as valuable on account of carbon dioxide. However, the mineral reservations clearly embrace the term "gas." We must, therefore, presume that the land was either withdrawn, classified, or reported as valuable on account of "gas." The time to challenge the propriety of a reservation contained in a patent is at the time of issuance of the patent. *See Brennan v. Udall,* 379 F.2d 803, 807 (10th Cir.), *cert. denied,* 389 U.S. 975 (1967).

Related Terms 479 (1968) (definition of "gas"); S. B. Talmage and A. Andreas, Carbon Dioxide in New Mexico, (New Mexico Bureau of Mines and Mineral Resources Circular No. 9 (1942)) (Appellants' Brief at Tab 28). However, appellants argue a distinction should be drawn between two types of gas—hydrocarbons and nonhydrocarbons—when interpreting the reservation under the 1914 Act. [90 IBLA 301] In their statement of reasons for appeal, appellants contend that in providing for a reservation of gas under the Act of July 17, 1914, Congress intended only to reserve hydrocarbons which (unlike nonhydrocarbons) may be used as a source of fuel. Appellants recite that certain lands of the United States had been withdrawn from nonmineral entry by petroleum withdrawals in the early days of the 20th century in order to conserve supplies of "mineral fuels" for the benefit of the entire country (Message from the President, dated Feb. 13, 1907, 41 Cong. Rec. 2806-08 (1907) (Appellants' Brief at Tab 15)), but that this had resulted in the closing of millions of acres of land to homestead and other entry. In order to open such land to nonmineral entry, but yet to continue the protection afforded these minerals, appellants point out, Congress enacted the Act of July 17, 1914, and other similar acts, opening the lands to nonmineral entry while reserving these minerals to the United States. *See United States v. Union Oil Company of California*, 549 F.2d 1271, 1274-75 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977).[7] Appellants argue that the reservation in the 1914 Act had the same purpose as the various withdrawals, *i.e.*, to protect

[7] The *Union Oil* case involved an analysis of the scope of the mineral reservation in patents issued under section 9 of the Stock-Raising Homestead Act of 1916, 43 U.S.C. §299 (1982). The opinion of the court provides an illuminating discussion of the background and purpose of the mineral reservations.

"mineral fuels." Appellants also recognize the intent to reserve mineral fertilizers in the 1914 Act. Appellants state that oil, gas, and asphaltic minerals fall into the category of mineral fuels and phosphate, nitrates and potash fall into the category of mineral fertilizers.

In support of their argument that the minerals listed in the Act of July 17, 1914, fall into two basic categories, *i.e.*, mineral fuels and [90 IBLA 302] fertilizers, appellants refer first to a statement by A. A. Jones, First Assistant Secretary of the Interior, in a letter to the Chairman, Committee on Public Lands, U.S. Senate, dated September 16, 1914, recommending passage of Senate Bill 6484 extending the provisions of the Act of July 17, 1914, to Alaska. After discussing the Act of July 17, 1914, and other statutes opening mineral land to agricultural entry subject to a reservation of minerals, First Assistant Secretary Jones stated: "From the foregoing, it appears that Congress has, in the United States proper, inaugurated a definite policy of separate dispositions of surface estates and mineral deposits in certain classes of important fuel and fertilizer minerals. With this general policy, this Department is in hearty accord" (Appellants' Brief at Tab 15).

In further support of their contention that, at the time of passage of the Act of July 17, 1914, both Congress and the Department considered gas to be a hydrocarbon, appellants refer to a Departmental publication in which the term "oil and gas" is used interchangeably with the term "hydrocarbons." George Otis Smith, The Classification of the Public Lands (Geological Survey, U.S. Department of the Interior, Bulletin 537, 1913) (Appellants' Brief at Tab 6). In particular, Survey stated:

"The immediate purpose of the classification of oil and gas land is to withhold from entry all lands containing valuable deposits of fluid hydrocarbons pending the enactment of adequate legislation providing for their disposition." *Id.* at 117.

It appears from the record that at the time of passage of the Act of July 17, 1914, carbon dioxide was recognized as a constituent of natural gas, although it was regarded as an impurity. It is unlikely that Congress [90 IBLA 303] had any specific intent regarding whether the reservation of gas under the Act included a reservation of carbon dioxide since, although carbon dioxide was known to be a component of natural gas, it was not considered to have commercial value.[8]

Courts have had occasion previously to consider whether a conveyance of "gas" encompasses nonhydrocarbon gases. In *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966), the court was called upon to determine whether a lease of "oil and gas deposits" on the Navajo Reservation approved by the Assistant Secretary of the Interior in 1923 conveyed the right to produce helium, a noncombustible,

[8] In a letter to the Trans-America Oil Company, dated July 13, 1932, quoted in appellants' brief, Joseph M. Dixon, Acting Secretary of the Interior, stated:

"In August, 1921, the Utah Oil Refining Company drilled a test well on oil and gas prospecting permit, Salt Lake City 026100, on the Farnham Structure in Utah, and at a depth of 3086 feet encountered a flow of approximately twelve million cubic feet per twenty-four hours of practically pure carbon dioxide gas. However, as carbon dioxide gas was considered at that time as of no commercial value, the well was plugged and abandoned at a depth of 3235 feet in January, 1924."

(Appellants' Brief at Tab 26).

nonhydrocarbon gas found to be associated with other hydrocarbon and nonhydrocarbon gases.[9] The court noted first that gases existing in nature do not fall into mutually exclusive categories such as hydrocarbon and nonhydrocarbon. Rather, the various elements are commingled and the hydrocarbon content cannot be produced separately from the other components. *Id.* at 326.

[90 IBLA 304] After noting that the parties to the lease may have been contemplating mainly fuel-type gases, the court found it "more realistic to presume that the grant included not only hydrocarbons but other gaseous elements as well." *Id.* at 326. Hence, the court held that, regardless of whether the percentage of helium content was high or low, the helium component was part of the gas deposit conveyed to the lessee. *Id.* at 326. The court found this holding consistent with the general intent of the parties and rejected lessor's contention that, in the absence of a showing of specific intent to convey helium, the lease included only hydrocarbon gases. *Id.* at 326-37.[10]

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[9] The composition of the gas was set forth in the opinion of the court as follows:

	Percentage
Methane and other hydrocarbons	17.0
Nitrogen	72.6
Helium	7.6
Carbon Dioxide	2.8
	100.0

364 F.2d at 324.

[10] The court also rejected application of the doctrine of *ejusdem generis* (general words following enumeration of specific things are to be construed as including only things of the same kind or class) to find from the lease of "oil and gas" that the term "gas" was limited in scope to hydrocarbons. This is one of the arguments made by appellants in the present case.

In *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), the court was called upon to determine whether oil and gas leases in the enormous gas fields of the Hugoton area embracing approximately 33,000 square miles and 21 million acres conveyed the helium produced with the hydrocarbon gas. After quoting the trial court's definition of gas as including any naturally formed aeriform substances indigenous to the underlying reservoir, which aeriform substances include helium, *id.* at 711, the court found the issue to be one of intent. The court rejected the landowners' reliance on the doctrine of *ejusdem generis* to support their claim that helium, a nonhydrocarbon, was not conveyed by the oil and gas leases. The court found the word "gas" to have "equal status" with the word "oil," citing *Navajo Tribe of Indians v. United States*, *supra*.

[90 IBLA 305] The *Northern* court characterized the critical issue as whether general or specific intent controls. The court accepted the trial court finding that gas did not connote helium to the average landowner, that no landowner contemplated helium in granting the right to produce gas, and that the landowner had no intention whatever regarding helium. After finding that helium emerges as a component of the gas produced from a gas well which necessarily comes from the wellhead and into the transmission line with all the gases which make up the entire stream, the court held that general intent would include in the lease all components of the gas produced by the wells, whereas specific intent would embrace only combustible gas. *Northern Natural Gas Co. v. Grounds*, 441 F.2d at 712-14.

The court found that nothing in the leases disclosed an intent to convey only combustible (hydrocarbon) gases and that, if such were the intent of the lessor, it should have been specified. More significantly, the court held that in the absence of lessor's knowledge of the presence of helium at the time of leasing, they could not have had a specific intent and the general intent is dispositive. *Id.* at 714. The court found that the general intent must be determined by considering the purpose of the grant in terms of enjoyment of the rights created, *i.e.*, the desire of the landowners to profit by production of gas from their lands, to which end they gave exclusive leases permitting exploration, development, production, and marketing of gas. After noting that the gas came from the ground with all its components and that wellhead separation of the helium was impractical, the *Northern* court refused to read into the leases a "subjective intent to convey only those components of the gas which comport to a subjective notion of the commercial end uses at the time of lease execution." *Id.* at 715.

[90 IBLA 306] We find the analysis of the courts in the *Navajo* and *Northern* decisions compelling in determining the scope of the reservation of "gas" under the Act of July 17, 1914. Although Congress and the Department were apparently thinking of gas primarily as a hydrocarbon fuel at the time of enactment, there is no limitation of the reservation in the Act to hydrocarbon gas. The fact that carbon dioxide, although recognized as a component of gas, was not perceived to have commercial value, further tends to negate the existence of a specific intent with respect to reservation of carbon dioxide. In the absence of a specific intent to exclude carbon dioxide from the reservation of gas, we must

reject appellants' attempt to read into the Act a "subjective intent to [reserve] only those components of the gas which comport to a subjective notion of the commercial end uses at the time." *Northern Natural Gas Co. v. Grounds, supra* at 715.

This is consistent with the holding of the court in *Brennan v. Udall*, 251 F. Supp. 12 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967), in examining the applicability of the reservation of oil under the 1914 Act to oil shale. After noting Congress did not specifically address oil shale in passing the Act, the court found that the purpose and history of the Act, viewed in light of the overall policy of Congress regarding separation of mineral and surface rights, leads to the conclusion that the term "oil" was used in its broadest, generic sense which included oil shale. *Id.* at 24-25. Similarly, the term "gas" must be interpreted to include all of the component parts of gas and not only the hydrocarbon content thereof."

[90 IBLA 307] An important additional factor when considering the intent of the withdrawals and the subsequent reservations in agricultural entry patents is the recognition of the fugacious character of oil and gas.

" Appellants seek to distinguish the carbon dioxide deposit in this case from other occurrences of carbon dioxide produced from underground wells on the basis that this deposit is 99 percent pure. The record indicates the remaining content of the gas is nitrogen, 0.9 percent, and methane (a hydro-carbon component of gas), 0.1 percent. Accordingly, appellants argue that the carbon dioxide is not "commingled" with hydrocarbon gas. Although it may be conceded that in this case the hydrocarbon content is so minor as to be insignificant, the deposit remains a naturally formed gas indigenous to the underlying reservoir consisting of several commingled components. The notion that title to an underlying gas reservoir may rest on the results of a "purity test" is properly rejected.

Early cases compared oil and gas to wild animals which are not reduced to ownership until captured. *New American Oil & Gas Mining Co. v. Troyer*, 76 N.E. 253 (1905); *Dark v. Johnston*, 55 Pa. 164 (1867). As a result, steps were taken to protect these fugacious commodities from drainage by adjacent owners, and the waste which resulted from attempts to capture oil and gas before it was captured by others. This being the case, it can reasonably be assumed that when using the term "gas," the intent was to include all mineral deposits of a gaseous nature, rather than to differentiate between hydrocarbon gas and nonhyrocarbon gas.

Further, it is clear that for many years both Congress and the Department have considered a gas lease to convey nonhydrocarbon gaseous components, unless there is an express provision to the contrary. Thus, section 1 of the Mineral Leasing Act of February 25, 1920, which provided for the leasing of oil, gas, and other mineral deposits owned by the United States, expressly reserved to the United States the ownership of and the right to extract helium from all gas produced from leased lands. Mineral Leasing Act of 1920, ch. 85, §1, 41 Stat. 437-38 (codified at 30 U.S.C. §181 (1982)). This Department has previously recognized that, if nonhydrocarbon gases were not [90 IBLA 308] within the meaning of the term "gas," it would not have been necessary to expressly exclude the right to extract helium under Federal oil and gas leases. Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits, *Solicitor's Opinion*, 88 I.D. 538 (1981).

On May 7, 1936, the Department promulgated regulations implementing the Mineral Leasing Act,

specifically listing "carbon dioxide" as a gas which was subject to leasing, and providing for the payment of royalties on production. Circular No. 1386, 55 I.D. 502, 511, 521 (1936). Moreover, since 1942, the Department has defined gas as "any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperature and pressure conditions." 30 CFR 221.2(o) (7 FR 4133 (June 2, 1942), currently codified at 43 CFR 3000.0-5(a)). A letter dated July 13, 1932, from Joseph M. Dixon, Acting Secretary of the Interior, to the Trans-American Oil Company (reproduced in Appellants' Brief at Tab 26) confirms that at least since 1928 carbon dioxide was considered to be leasable under the Mineral Leasing Act of 1920:

> In a letter dated June 16, 1928, to Mr. George D. Parkinson of Salt Lake City, Utah, the First Assistant Secretary of the Interior stated that:
>
> > "In my opinion the regulations pertaining to prospecting for oil and gas under the act of February 25, 1920 (41 Stat. 437), would be applicable to prospecting for carbon dioxide gas and in the event of a valuable discovery of such gas a lease would issue in accordance with the provisions, regulations, and royalties pertaining to that act."
>
> On February 4, 1930, the Solicitor of the Department again considered this question and others in connection with the development of carbon dioxide gas for commercial purposes, affirming the former conclusions.

[90 IBLA 309] Thus, we have recognition by Congress that the scope of the term "gas" embraces nonhydrocarbon gases such as helium, as well as the long Departmental history of treating carbon dioxide gas as embraced within an oil and gas lease issued pursuant to the Mineral Leasing Act of 1920. Although not conclusive, this supports a finding that carbon dioxide is within the scope of the gas reservation under the Act of July 17, 1914.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

C. RANDALL GRANT, JR.
C. Randall Grant, Jr.
Administrative Judge

We concur:

FRANKLIN D. ARNESS
Franklin D. Arness
Administrative Judge

R. W. MULLEN
R. W. Mullen
Administrative Judge

Order of the United States Department of the Interior Dated November 27, 1987

United States Department of the Interior

(Seal) OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

November 27, 1987

IBLA 88-22	:	Recordable Disclaimer of Interest
IRVING L. NORTON, et al.	:	C-46048, C-46049
	:	Motion for Expedited Consideration Granted
	:	Decision Affirmed

ORDER

Appellants, Irving L. Norton and Dana Norton, have brought this appeal from a September 18, 1987, decision of the Colorado State Office, Bureau of Land Management (BLM), rejecting their application for a recordable disclaimer of interest in the carbon dioxide in certain lands owned by them. The BLM decision recites that the lands were patented subject to a reservation of oil and gas to the United States pursuant to the Act of July 17, 1914, *as amended*, 30 U.S.C. §121 (1982). Appellants contend carbon dioxide was not encompassed within the scope of the reservation of gas to the United States.

The BLM decision rejected appellants' contention and found that carbon dioxide was reserved to the United States, citing this Board's decision in *Robert D. Lanier*,

90 IBLA 293, 93 I.D. 66 (1986). On appeal, counsel for appellants has filed a motion to expedite consideration of this case. In support of this motion, counsel contends that on the merits this case is identical to *Robert D. Lanier, supra*, and that appellants are seeking to exhaust their administrative remedies as a prerequisite to obtaining judicial review. In consideration of the motion and the grounds stated therein, the motion for expedited consideration is hereby granted. The Board reaffirmed its decision in *Robert D. Lanier, supra*, and, on that basis, the decision of BLM is affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. RANDALL GRANT, JR.
C. Randall Grant, Jr.
Administrative Judge

I concur:

W. PHILIP HORTON
Wm. Philip Horton
Chief Administrative Judge

APPEARANCES:

Stephen H. Muse, Esq.
5919 Winding Ridge
San Antonio, Texas 78239

Supreme Court, U.S.
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No. 90-1225

In The

Supreme Court of the United States

October Term, 1990

JOE AULSTON and LOLA AULSTON; HOWARD L. BARTLEY and ELSIE BARTLEY; VIRGINIA BASSETT; ROGER A. BIGLER, Trustee; et al.;

Petitioners,

vs.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; MANUEL LUJAN, JR., in his official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; CY JAMISON, in his official capacity as Director of the U.S. Bureau of Land Management; H. ROBERT MOORE, in his official capacity as Colorado State Director of the Bureau of Land Management,

Respondents,

and

SHELL WESTERN E & P, INC.; CONOCO, INC.; VINCENT J. DUNCAN; RAYMOND T. DUNCAN; ELECTRA INVESTMENT; SYNERGY EXPLORATION, CO.; GULF OIL CORP.; MOBIL PRODUCING TEXAS/ NEW MEXICO; UMC PETROLEUM CORP.; ESTATE OF WALTER DUNCAN; TIDELANDS ENERGY CO.; UNIVERSAL RESOURCES CORP.; LENDON CO.; DUNCAN ENTERPRISES, INC.; JUSTIN R. MEYER; BARBARA L. MEYER; PHILLIPS PETROLEUM CO.,

Intervenors-Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE INTERVENORS-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARLA J. WILLIAMS
ERIN M. SMITH
HOLME ROBERTS & OWEN
1700 Lincoln
Suite 4100
Denver, Colorado 80203
(303) 861-7000

JAMES W. SPENSLEY
Counsel of Record
HOLME ROBERTS & OWEN
1700 Lincoln
Suite 4100
Denver, Colorado 80203
(303) 861-7000

Attorneys for Intervenors-Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. In construing the word "gas" as used in the Agricultural Entry Act of 1914, may the court give deference to the Interior Department's consistent and long-standing interpretation?

2. Even if the court were precluded from giving weight to the Department's interpretation is it nonetheless correct that a reservation of "gas" under the Agricultural Entry Act of 1914 includes noncombustible gases such as carbon dioxide?

LIST OF PARTIES PURSUANT TO RULE 29.1

Shell Western E & P, Inc.

Parent: Shell Energy Resources Inc.; Shell Oil Co.; Royal Dutch Petroleum/Shell Transport & Trading Co.

Subsidiaries: Belridge Farms; Belridge Packing Co.; Choctaw Pipe Line Co.; Mabee Petroleum; Shell Michigan Pipeline Co.; SWEPI Royalties Inc.; Shell Cortez Pipeline Co. (partially owned subsidiary: Cortez Capital Corp.); (affiliates: Shell Western Pipelines Inc.; East Texas Salt Water Disposal Co.; Grande Ecallie Land Co., Inc.); Van Salt Water Disposal Co.; Wyoming Industrial Development Corp.

Conoco, Inc.

Parent: E.I. Dupont De NeMours and Company

Subsidiaries, excluding wholly owned subidiaries: Big Sky Montana Realty, Inc.; Cit-Con-Oil Corporation; Conch International Methane Ltd.; Du Pont Scandanavia AB; ARA Gavle AB; ARA Jonkoping AB; Drivmedeiscentvalen; Maxi Benson AB; Howson-Algraphy Aktiebolag; ACE Limited; A.C.E. Insurance Company (Bermuda) Ltd; A.C.E. Insurance Company Ltd; Conoco Cumi Cumi Limited; Conoco Dabaa Ltd.; Conoco El Hamma (Tunisia) Ltd.; Conoco Faghur Ltd; Conoco Iraq Ltd.; Conoco Kayes (Congo Ltd.); Conoco N'dombo (Gabon) Ltd.; Conoco North Ras Qattara Ltd.; Conoco North Sitra Ltd.; Conoco Oriente Ltd; Conoco Peru Ltd.; Conoco Warim Ltd.; Conoco West Ras Qattara Ltd.; Conoco Yemen (Aden) Ltd.; Conoco Yemen (Sanaa) Ltd.; EXEL Limited; X.L. Insurance Company Ltd.; Oil Insurance Ltd.; Conoco Onango (Gabon) Ltd.; Conoco South Umbarka Ltd.; Conoco Spain Ltd.; OK Coop A.G.; T.A.L.;

LIST OF PARTIES PURSUANT TO RULE 29.1 – Continued

Conoco Arabia Limited; Conoco Buton Ltd.; Conoco Cabinda (Angola) Ltd.; Conoco Cegonha (Angola) Ltd.; Louisiana Carbon Company; Nelson Industrial Steam Company (NISCO); Oberrheinische Mineraloelwerke GmbH (A/K/A OMW); Petco Enterprises Ltd.; Petrocokes, Ltd; Phoenix Park Gas Processors, Ltd; Iranian Investment Corporations; Iranian Oil Participants Ltd.; Iranian Oil Services (Holding) LTD; Iricon Agency, Ltd; The Standard Shale Products Company; Tidelands Royalty Trust; Venture Coke Company; Oasis Oil Company of Libya, Inc.; Societe de Financement Dela Route Tahoua 'Arlit; Cure Inc.; Felix Oil Company; Jupiter Chemicals, Inc.; Kettleman North Dome Association; Marine Preservation Association; CSPI BWN; Hydroflow Technologies, Ltd; Tongue River Holdings, Inc.; Tongue River Railroad; Ameropa Coal Trading and Shipping, Inc.; Conco North Ras Qattara Ltd.; K/S Statfjord Transport A.S. & Co.; Statfjord Transport A.S.; Colonial Pipeline Company; Continental Alaska Pipe Line Company; Milne Point Pipe Line Company; Dixie Pipeline Company; Explorer Pipeline Company; Heartland Pipeline Company; Joliet Pipeline Company; Lake Charles Pipe Line Company; Pioneer Investments Corporation; Pioneer Pipe Line Co.; Salt Lake Terminal Co.; Platte Pipe Line Company; Razorback Pipeline Company; Yellowstone Pipe Line Company; Khalda Petroleum Company; Etzel Gas Lager Project; JET Tankstellen-Betriebs-GmbH; Societue du Pipeline Sud-Eoropean SA; Suedbitumen GmbH.

LIST OF PARTIES PURSUANT TO RULE 29.1 – Continued

Vincent J. Duncan
Raymond T. Duncan
Duncan Enterprises, Inc.
Affiliate: Energy Partners Nominee Co.
Estate of Walter Duncan
Electra Investment
Synergy Exploration, Co.
Gulf Oil Corp. (purchased by Chevron U.S.A., Inc.)
Parent: Chevron Corp.
Subsidiaries of Chevron U.S.A., Inc.: American Personnel Services Inc.; Atlas Supply Co. (25% owned); Bolivian Gulf Oil Co.; The California Co.; Chevron Capital USA Inc.; Chevron Geothermal Co. of Cal.; Chevron Oil Finance Co.; Chevron Petroleum Co. of the Netherlands; Chevron Travel Club, Inc.; Federal Engineering Corp.; Felix Oil Co. (30.7% owned); Gulf Auto Club, Inc.; Gulf Oil Communications Co., Inc.; Gulf Oil Realty Co.; GOC Acquisition Corp.; Intermountain Geothermal Co.; International Bitumen Emulsions Corp.; Kewanee Industries, Inc.; Lost Hills Water Co.; Murvale Co.; Pembroke Capital Co., Inc. (50% owned); Petroleum Facilities, Inc.; Standard Gasoline Co.; Standard Oil Co.; Standard Oil Co. of Texas, Inc.; Transocean Group, Inc.; Warren Petroleum, Inc.; Western States Geothermal Co.

Mobil Producing Texas/New Mexico, Inc.
Parent: Mobil Corp.
Justin R. and Barbara L. Meyer
Tidelands Energy Co., Ltd.
Universal Resources Corp.

LIST OF PARTIES PURSUANT TO RULE 29.1 – Continued

Parent: Questar

Lendon Co.

Parent: Leonard Minerals Co.

*Phillips Petroleum Co.**

Subsidiary: Phillips Oil Co.

UMC Petroleum Corp. (formerly, MCO Resources, Inc.)

Subsidiaries: Silver Eagle Resources, Ltd.; MCR Geothermal Corp.; Big Chief Drilling Co. (subsidiary: Comet Drilling Co.); Reserve Oil & Gas Co.; UMC Pipeline Corp.; United Meridian International Corp.; I.E.I. Exploration Inc.

The following were interested parties in the proceeding before the Interior Board of Land Appeals, but did not move to intervene in the action filed in the Federal District Court:

Donald B. Anderson Ltd.

ARCO Oil & Gas Co. (division of Atlantic Richfield Co.)

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* Phillips Oil Co. assigned their interest to Phillips Petroleum Co. during the course of this litigation.

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ADDITIONAL STATUTORY PROVISIONS IN CASE
(Not Reproduced by Petitioners)

The Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181-287 (1988)), reads in part:

> Deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite (including all vein-type solid hydrocarbons), or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereafter provided, shall be subject to disposition in the form and manner provided by this chapter to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter.
>
> The term "oil" shall embrace all nongaseous hydrocarbon substances other than those substances leasable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons).
>
> The term "combined hydrocarbon lease" shall refer to a lease issued in a special tar sand

area pursuant to section 226 of this title after November 16, 1981.

The term "special tar sand area" means (1) an area designated by the Secretary of the Interior's orders of November 20, 1980 (45 FR 76800-76801) and January 21, 1981 (46 FR 6077-6078) as containing substantial deposits of tar sand.

The United States reserves the ownership of and the right to extract helium from all gas produced from lands leased or otherwise granted under the provision of this chapter, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further,* That in the extraction of helium from gas produced from such lands it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof.

STATEMENT OF THE CASE

Intervenors-respondents are lessees of one or more federal oil and gas leases issued by the United States under the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181-287 (1988)) ("1920 Mineral Leasing Act") that cover lands now included in the McElmo Dome Unit. Petitioners claim ownership of these lands under patents that reserve "oil and gas" or "oil, gas, potash and sodium" to the United States as provided in the Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509 (codified as amended at 30 U.S.C. §§ 121-125 (1988)) ("Agricultural Entry Act").[1]

[1] Because the Bureau of Land Management, the Interior Board of Land Appeals, the District Court and the Court of

(Continued on following page)

Petitioners also claim ownership of all carbon dioxide gas underlying these lands on the theory that the reservations of "gas" to the United States are too narrow to include noncombustible gases.

As early as 1950, carbon dioxide gas was discovered and produced from a federal oil and gas lease covering land now included in the McElmo Dome Unit, and was used to make dry ice. Int.-Resp. App. 17a-18a n.1.[2] Pet. App. 47a n.2. During the 1970s, two of the intervenors-respondents, Shell and Mobil, formed seven separate federal units to explore further for carbon dioxide gas. *Id.* The acreage covered by these seven units was ultimately combined to form the McElmo Dome Unit, which is operated by Shell. *Id.* Approximately 242 federal oil and gas leases are included in the Unit, at least 115 of which are directly affected by petitioners' claims. Int.-Resp. App. 17a-18a n.1.

The McElmo Dome Unit is a producing oil and gas unit formed under the authority of the 1920 Mineral

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(Continued from previous page)

Appeals have all rejected petitioners' argument that the term "gas" does not include carbon dioxide gas, petitioners have not yet had to prove their ownership of the patented interests. It will be assumed for purposes of this brief, however, that petitioners are, in fact, successors in interest to the original patentees.

[2] Petitioners' Statement of the Case does not include reference to the decision of the BLM, dated December 17, 1984, that was appealed to the Interior Board of Land Appeals and resulted in the *Robert D. Lanier* decision set forth at Pet. App. 45a-63a. A copy of the BLM decision is included here as Appendix A (Int.-Resp. App. 1a-24a).

Leasing Act and approved by the Department of the Interior ("Department"), Bureau of Land Management ("BLM") and the Colorado Oil and Gas Conservation Commission effective April 1, 1983. Int.-Resp. App. 17a-18a n.1, 21a n.14. The primary purpose of the Unit is to extract gas from the Mississippian Leadville Formation underlying the Unit. Int.-Resp. App. 17a-18a n.1; Pet. App. 47a n.2. This gas deposit was expressly found by the Department to be "a naturally formed gas indigenous to the underlying reservoir consisting of several commingled components". Pet. App. 60a n.11. Those components include carbon dioxide gas (99%), nitrogen gas (0.9%) and methane gas (0.1%).[3]

Though painted with petitioners' brush, petitioners' Statement of the Case (Pet. 3-6) is an adequate statement of the procedural history of this dispute in most

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[3] Subsequent information regarding the composition of the McElmo Dome gas stream indicates that the percentage of carbon dioxide gas is slightly less than 99%, and the percentage of hydrocarbons is slightly greater than 0.1%. Small, but marketable, amounts of oil are also present. Intervenors-respondents agree with the Court of Appeals that petitioners' "purity test" is unworkable as a rule of mineral conveyancing and that, consequently, the precise composition of the gas stream is irrelevant. Petitioners, however, continue to stress the "purity" of the McElmo Dome gas and continue to raise their "purity test" argument. Pet. 22. If this Court were to grant petitioners' request for review and ultimately accept petitioners' argument that the ratio of hydrocarbon to non-hydrocarbon gases is determinative of whether a particular gas deposit is "gas" for purposes of a mineral reservation, the matter would need to be remanded to the agency for a full factual and technical hearing on the characteristics and composition of the reservoir and gas stream.

important respects.[4] Petitioners' characterization of the Court of Appeals' opinion, however, is not accurate. Pet. 6. As discussed in Part I below, the Court of Appeals did note that the Interior Department had no occasion, prior to the inception of this dispute, to determine *explicitly* whether carbon dioxide is "gas" within the meaning of the Agricultural Entry Act. The court concluded, however, that the Department had a long-standing, publicly-held interpretation of "gas" as used in contemporaneous and interrelated legislation that is to be construed *in pari materia* with the Agricultural Entry Act. Petitioners' statement that the Court of Appeals rejected their argument regarding contemporaneous agency interpretation "without discussion" (Pet. 6) is also incorrect. See Pet. App. 24a-25a.[5]

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[4] Petitioners assert in their Statement of the Case (and again at Pet. 12, n.6) that the carbon dioxide gas in issue is valued at more than $500 million. Because this alleged fact is irrelevant to the issue of gas ownership, intervenors-respondents do not consider the statement significant. It should be noted, however, that this alleged fact is not within the administrative record. Elsewhere, petitioners imply that more than 5.5 million acres of land are affected by the Court of Appeals' judgment. Pet. 9, 23. This alleged fact is likewise irrelevant to ownership and outside the administrative record.

[5] The opinion of the Court of Appeals for the Tenth Circuit is reproduced in petitioners' Appendix A, Pet. App. 1a-39a. In reviewing the Appendix, we noted a typographical error at Pet. App. 21a, line 12. The text should read "More significantly, the 1914 Act itself incorporated ***none*** of the language employed in the letters and documents to which plaintiffs cite." We bring this error to the Court's attention because the sentence is a significant one.

WHY THE WRIT SHOULD BE DENIED

Petitioners fail to demonstrate that the judgment of the Tenth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. *See* Sup. Ct. R. 10.1(a). Each of the arguments raised by petitioners in their request for a writ of certiorari was addressed by the Court of Appeals in a lengthy and exhaustive opinion that employed a thorough and careful analysis consistent with the dictates of this Court. Further review is, therefore, unnecessary.

The Tenth Circuit Court of Appeals upheld the Department's determination that the word "gas" as used in the Agricultural Entry Act is broad enough to include combustible gases, such as methane, and noncombustible gases, such as the carbon dioxide gas in issue. Petitioners' novel argument for review by this Court – that the Court of Appeals erred in giving "retroactive deference" to the Department's 1986 interpretation of the Agricultural Entry Act – mischaracterizes the court's opinion. Petitioners' argument assumes that the interpretation of "gas" set forth in the *Lanier* decision (*Robert D. Lanier*, 93 I.D. 66, 90 IBLA 293 (1986), reproduced at Pet. App. 45a-63a) is an entirely new agency interpretation and that it is being shown "retroactive deference" in a manner that divests petitioners of their previously held title to noncombustible gases.

This is simple bootstrapping. The Court of Appeals expressly concluded that the Department's interpretation of "gas" in *Lanier* is not new; it tracks the Department's long-standing and publicly-held interpretation of the

word "gas" in contemporaneous and interrelated legislation. Pet. App. 27a-29a, 22a-23a n.13. Though petitioners may disagree with this conclusion, they fail to challenge it directly. Instead, petitioners beg the question entirely by first ignoring the court's finding and then attacking the court for deferring to a new interpretation of gas that "retroactively" strips petitioners of their vested rights.

Also built into petitioners' "retroactive deference" argument is the inference that the Department's interpretation of the word "gas" set forth in *Lanier* is not only new, but effects a change from the past that divests petitioners of title to the carbon dioxide gas. Thus, petitioners assume their own ultimate conclusion of ownership in order to portray the effects of the Department's interpretation as "retroactive". Again, however, the Court of Appeals expressly and systematically rejected each and every argument made by petitioners that the text of the Agricultural Entry Act, its legislative history, or prior Department interpretations of "gas" operated in the past to place title to carbon dioxide gas in petitioners.

The Court of Appeals was not required to construe the Agricultural Entry Act in isolation, without giving consideration to long-standing agency interpretation in related legislation and without regard to broader policies such as the rational management and disposition of the public lands. The best that can be said from petitioners' point of view is that prior to *Lanier*, the Department had not had specific occasion to apply its consistent and long-standing interpretation of gas to the precise issue of whether the reservations of gas in petitioners' patents cover carbon dioxide gas. In this narrow sense, the Department was faced with a case of first impression.

Neither the Department's interpretation of "gas" nor the Court of Appeals' deference to it, however, is "retroactive" simply because the specific circumstances of *Lanier* had not been addressed before. A consistent and long-standing interpretation of gas in the general context of public lands leasing and disposition had been established. In *Lanier*, the Department did not depart from that consistent and long-standing interpretation. Rather, the Department adhered to its long-standing interpretation by applying the principles underlying that interpretation to the specific issues raised. If this is retroactive agency interpretation or "retroactive deference" to agency interpretation, so is every other instance where an agency applies a general interpretation or policy to a specific situation and the courts give weight to the agency's judgment.

Finally, as demonstrated in Part II below, even if no deference whatsoever were owed to the Department's long-standing interpretation of "gas" and the task before the Court of Appeals was to ascertain the "correct" meaning of the Agricultural Entry Act, it is clear from the court's opinion that the word "gas" should be construed in a manner broad enough to encompass both combustible and noncombustible gases.

I. THE COURT OF APPEALS PAID PROPER DEFERENCE TO THE DEPARTMENT'S INTERPRETATION OF THE WORD "GAS".

A. Petitioners' "Retroactive Deference" Argument Incorrectly Portrays the Interpretation of the Department in *Lanier* as an Isolated Instance and Portrays the Deference Shown by the Court of Appeals as Based Solely on That Instance.

The deference paid to the Department by the Court of Appeals was not based solely upon the specific

interpretation of "gas" applied by the Department in the 1986 *Lanier* decision. The court's willingness to uphold the Department was based, instead, upon a finding that the Department's specific interpretation of "gas" in *Lanier* is consistent with its long-standing and publicly-held interpretation of "gas" in contemporaneous legislation so closely related to the Agricultural Entry Act as to make deference appropriate. Pet. App. 27a-29a.

The Court of Appeals carefully reviewed the Agricultural Entry Act, together with the broader statutory scheme governing management and disposition of public lands of which the Agricultural Entry Act is a part. In the course of its review, the court concluded: (i) that the Agricultural Entry Act and the 1920 Mineral Leasing Act are substantially contemporaneous and interrelated statutes (Pet. App. 21a-22a, 27a-29a); (ii) the word "gas" in the Agricultural Entry Act and the 1920 Mineral Leasing Act should be construed *in pari materia*[6] (Pet. App. 17a n.11, 22a, 22a-23a n.13, 28a); and (iii) the word "gas" used in the 1920 Mineral Leasing Act includes both combustible and noncombustible gases (Pet. App. 22a, 22a-23a n.13).

Given the historic and functional relationship between the Agricultural Entry Act and the 1920 Mineral

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[6] The Court of Appeals also noted that "gas" as used in a related 1922 statute governing Alaska patents is, likewise, broad enough to include noncombustible gases and further concluded that the most rational reading of the Agricultural Entry Act, the 1920 Mineral Leasing Act and the 1922 statute is that Congress intended "gas" to mean the same thing in all three statutes. Pet. App. 22a-23a n.13, 27a-29a.

Leasing Act[7] and need for construing "gas" in both statutes *in pari materia*, the Court of Appeals properly concluded that the Department's interpretation of the word "gas" under Section 181 of the 1920 Mineral Leasing Act is entitled to some deference – particularly where, as here, the interpretation is one of long-standing, is publicly-held and is fully consistent with the specific application made by the Department in *Lanier*. Pet. App. 29a.[8]

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[7] There is also an added historic and functional connection between these two statutes. It appears that the pre-patent classification of petitioners' lands as valuable for oil and gas was based upon permits to prospect for oil and gas issued under the 1920 Mineral Leasing Act. Thus the "gas" for which petitioners' lands were classified as valuable was "gas" as that word is used in the 1920 Mineral Leasing Act. This further supports the Department's interpretation and the court's conclusion that the word "gas" in the Agricultural Entry Act should be construed *in pari materia* with the 1920 Mineral Leasing Act. Pet. App. 17a n.11.

[8] In addition, the Court of Appeals noted numerous other contemporaneous Department communications indicating that the Department interpreted "gas" broadly enough to include both combustible and noncombustible gas. For example, in 1915, years before any of petitioners' patents were issued and decades before intervenors developed the carbon dioxide gas in the McElmo Dome Field, a Department bulletin was published characterizing a gas stream comprised *ninety-one percent* of carbon dioxide gas as "natural gas". Pet. App. 25a. Another 1913 Department bulletin shows that gas in the Department's view meant fuel gas for the most part, but not *only* fuel gas. Pet. App. 24a. Yet another 1911 Department bulletin indicates the Department was well aware that gas fields in California contained significant nonhydrocarbon constituents. Pet. App. 19a n.12.

B. Petitioners' "Retroactive Deference" Argument Ignores the Express Findings and Analyses of the Court of Appeals and Assumes Its Own Conclusion.

Petitioners seek this Court's review on the basis that the Court of Appeals has adopted a new and dangerous methodology of "retroactive deference". Though couched in these confusing terms, petitioners' argument boils down to a claim that the Court of Appeals has permitted the Department to change its interpretation and apply it retroactively in a manner that divests petitioners of previously vested interests in carbon dioxide gas. This argument is in turn based upon two faulty premises: the first premise – that the Department's interpretation of "gas" applied in *Lanier* is a new interpretation that changes preexisting Department policy – ignores the Court of Appeals' express findings that *Lanier* is consistent with the Department's long-standing interpretation of "gas"; the second premise – that the decision in *Lanier* operates to divest petitioners of title to carbon dioxide gas – begs the question entirely by assuming that, absent *Lanier*, patents reserving gas to the government reserve only combustible gases.

It is clear from its opinion that the Court of Appeals did not view the Department's decision in *Lanier* as establishing a new interpretation of gas or departing from prior Department practices. Rather, *Lanier* represents a specific application by the Department of its long-standing and publicly-held view of what the word "gas" means when used in oil and gas leases, oil and gas permits and other conveyancing contexts relating to the public lands administered by the Department.

Similarly, the Court of Appeals found nothing in the text of the Agricultural Entry Act, its legislative history or any statements, actions or policies of the Department that, absent *Lanier*, would permit petitioners to lay claim to carbon dioxide gas or any other gas. Petitioners' argument against "retroactive deference" to the Department's interpretation of "gas" might have merit if, at the time petitioners' patents were issued, the Department had held a consistent and long-standing interpretation of the word "gas" to mean combustible gases *only* and petitioners had relied to their detriment on that interpretation. Such is not the case, however. The issue of how much deference, if any, should be paid to a flip-flopping agency interpretation of the word "gas" was not before the Court of Appeals; and petitioners cannot presume that the court would give the same weight to an ever-changing and conflicting Departmental interpretation that it gives to a consistent and long-standing interpretation.[9]

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[9] The Department itself recognizes limits on its ability to change its interpretations and policies abruptly and apply them retroactively – limits designed to protect vested rights and preclude the spectre of "badminton" title raised by petitioners. *See Sun Exploration & Production Co.*, 112 IBLA 373 (January 19, 1990) (Department may give a new interpretation of a regulation retroactive application only if: the party affected by the retroactive application has not relied to its detriment on the previous interpretation; the Department has not acquiesced in the conduct required of the party under the old interpretation; the new procedure is an attempt to fill a void in an unsettled area of the law, and not an abrupt departure from a well-established practice; and the prejudice to the

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C. Petitioners' "Retroactive Deference" Argument Marks a Reversal of Petitioners' Position Before the Court of Appeals.

While petitioners don't so state directly, their "retroactive deference" argument also implies that the Department's long-standing interpretation of "gas" in contemporaneous and interrelated legislation is irrelevant to construction of the Agricultural Entry Act. The corollary implication is, of course, that only Department interpretations dealing *specifically* with "gas" as used in the Agricultural Entry Act should have been considered by the Court of Appeals. This marks a reversal from petitioners' prior position. Petitioners argued extensively before the Court of Appeals that the Department's interpretation favored petitioners' construction of the Agricultural Entry Act. In making that argument, petitioners cited freely to Department bulletins, correspondence and regulations, both old and new, that do not purport to interpret "gas" specifically as it is used in the Agricultural Entry Act. Moreover, petitioners expressly

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affected party substantially outweighs the statutory interest and purposes sought to be protected). *Accord Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971); *NLRB v. Bufco Corp.*, 899 F.2d 608, 612 (7th Cir. 1990); *Runnells v. Andrus*, 484 F. Supp. 1234, 1238 (D. Utah 1980). It was unnecessary for the Court of appeals to discuss these limitations, however, because the court found no inconsistencies in the Department's interpretation of "gas" in the nearly 80 years that the Department has been administering the lands affected by the Agricultural Entry Act. Moreover, it was intervenors-respondents, not petitioners, who invested substantial time and capital developing the gas in reliance on the Department's interpretation.

acknowledged the relevance of the Department's interpretation of contemporaneous statutes. Pet. 10th Cir. Opening Brief 38-43.

Petitioners' new position is unpersuasive and without legal support. It was recognized by this Court shortly after the statutes were enacted that the Agricultural Entry Act and the 1920 Mineral Leasing Act were "to be read together – each as a complement of the other." *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 504 (1928). As the Court of Appeals likewise observed, the most rational interpretation is that Congress intended the word "gas" to mean the same thing in the Agricultural Entry Act and in other contemporaneous statutes relating to the management and disposition of minerals underlying the public lands. Pet. App. 22a-23a n.13. Petitioners offer nothing to refute this reasoning or to justify their change in position other than to state flatly, and without analysis, that they "strongly doubt" *in pari materia* is appropriate. Pet. 22. Merely stating that petitioners disagree with the Court of Appeals, however strongly, falls short of demonstrating that the court erred in a manner so egregious as to make exercise of this Court's supervisory powers necessary.

D. Petitioners' "Retroactive Deference" Argument Yields Unworkable Results.

Under petitioners' "retroactive deference" theory, no weight may be given by the courts to a long-standing agency interpretation when it is being applied by the Department for the first time to a new set of circumstances. The trick for petitioners, of course, is to define

"interpretation" as narrowly as possible so that a consistent agency pattern of long-standing is reduced to a series of fact-specific, isolated and unrelated events. For example, if years ago the Department had specifically interpreted reservations of gas under the Agricultural Entry Act to include helium,[10] petitioners would still be free under their theory to argue that deference by the court to the Department's interpretation in *Lanier* is nonetheless "retroactive" because *Lanier* involves carbon dioxide, not helium. The potential for mischief and manipulation from petitioners' "retroactive deference" theory is obvious.

In deferring to the Department in *Lanier*, the Court of Appeals was mindful of the fact that a long-standing and consistent agency interpretation of "gas" *specific to the Agricultural Entry Act* was lacking, and the court expressly took that fact into account before concluding that deference to the Department's more general long-standing interpretation was appropriate. Pet. App. 29a.

To grant petitioners the requested writ, this Court must be persuaded that the general view of agency interpretation employed by the Court of Appeals in this case constitutes a departure from the accepted and usual course of judicial proceedings so extreme as to require this Court's supervision. Such a conclusion would be unfounded, and petitioners' request must therefore be denied.

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[10] It should be noted in this connection that a broad construction of the word "oil" as used in the Agricultural Entry Act was upheld over 20 years ago in *Brennan v. Udall*, 251 F. Supp. 12 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir. 1967), *cert. denied*, 389 U.S. 975 (1967).

II. THE OPINION OF THE COURT OF APPEALS DEMONSTRATES THAT THE DEPARTMENT'S INTERPRETATION OF "GAS" IS NOT ONLY A REASONABLE INTERPRETATION, BUT THE "CORRECT" INTERPRETATION.

The Court of Appeals rejected petitioners' "purity test" stating that a rule that makes property rights to gas dependent upon the ratio of hydrocarbon to non-hydrocarbon gases would not aid in the rational development of the law of mineral resource rights. Pet. App. 33a-34a. Thus, the Court of Appeals did not see any middle ground: either carbon dioxide gas was reserved or it was not. Only one outcome could be "correct", if possible, and the Court of Appeals' opinion leaves no doubt that the Department's interpretation is the "correct" interpretation.

The evidence is overwhelming. The Court of Appeals rejected each and every argument made by petitioners in support of their interpretation. Most telling, however, is the court's conclusion that the word "gas" in the Agricultural Entry Act should be read *in pari materia* with the word "gas" in Section 181 of the 1920 Mineral Leasing Act. The court also expressly concluded that "the *most* rational reading [of the Agricultural Entry Act, the 1920 Mineral Leasing Act and a 1922 statute relating to mineral reservations in Alaska patents] is that Congress intended 'gas' to mean the same thing in all three statutes." (Emphasis added.) Pet. App. 22a-23a n.13. These conclusions, coupled with the court's conclusion that the word "gas" as used in the 1920 Mineral Leasing Act includes both combustible and noncombustible gas, can only yield one result – the "correct" interpretation is that "gas" in

the Agricultural Entry Act is a word broad enough to include combustible and noncombustible gases alike.

The Court of Appeals' treatment of the specific arguments made by petitioners is also telling. For example, in response to petitioners' argument that carbon dioxide gas was not one of the minerals for which petitioners' lands were withdrawn or classified as valuable (an argument petitioners resurrect at Pet. 15-16), the court not only rejects petitioners' reasoning, but goes on to observe that the oil and gas permits and other facts on which petitioners rely actually support the Department's interpretation of gas. Pet. App. 17a n.11. Similarly, in response to the arguments made by petitioners from legislative and historical materials, the court again observed that, if anything, a generic construction of the word "gas" is favored. Pet. App. 23a.

The Court of Appeals also concluded that petitioners' arguments failed to give proper weight to Congress's general intent to provide a statutory framework for the rational disposition of mineral resources. In this respect, the court reasoned, due regard must also be given to the analyses employed by courts resolving similar issues in the private mineral-conveyancing context. Pet. App. 31a-32a. The cases then cited by the court, *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 951 (1971) and *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966), both held that, absent express language to the contrary, "gas" used in the conveyancing context is broad enough to include hydrocarbon and nonhydrocarbon gas alike.

Given the Court of Appeals' conclusion that *in pari materia* construction with the 1920 Mineral Leasing Act is proper and that the analyses applied in *Northern Natural Gas* and *Navajo Tribe* are applicable, and given that each and every argument raised by petitioners failed to survive the court's careful scrutiny, it is obvious that the Court of Appeals favors the Department's interpretation of "gas" as a word broad enough to include carbon dioxide gas. If any doubt remains, however, the Court of Appeals ended by stating that petitioners' interpretation "strains credulity" (Pet. App. 35a) and that a construction contrary to the Department's "would undermine the fuel conservation purpose of the 1914 Act". Pet. App. 34a.

Finally, even if the Court of Appeals thought petitioners' interpretation of "gas" to be as reasonable and workable as the Department's (which it clearly did not), the court would have reached the same result nonetheless by applying the general rule that land grants are to be construed favorably to the United States. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59-60 (1983).

III. PETITIONERS' OTHER CRITICISMS OF THE COURT OF APPEALS' OPINION ARE WITHOUT MERIT AND DO NOT DEMONSTRATE THE NEED FOR SUPREME COURT REVIEW.

After presenting their "retroactive deference" argument, petitioners attempt to resurrect several other arguments, each of which was thoroughly analyzed and then rejected by the Court of Appeals. Petitioners fail to demonstrate that in rejecting those arguments, the Court of Appeals strayed so far from the accepted and usual

course of judicial proceedings as to make supervision by this Court necessary.

A. Petitioners Demonstrate No Error in the Court of Appeals' Conclusion That Petitioners' Lands Were Not Withdrawn or Classified as Valuable for Petroleum.

Petitioners argued before the Court of Appeals that their lands were withdrawn from homestead entry because they were determined to be valuable for petroleum. Consequently, argued petitioners, only petroleum and gas associated with petroleum could have been reserved to the government when the patents were ultimately issued. Pet. 10th Cir. Opening Brief 18-20.

The Court of Appeals rejected this argument on several bases, one being that the administrative record does not support petitioners' basic premise that their lands had been withdrawn or classified as valuable for "petroleum".[11] To the contrary, it appears from the administrative record that petitioners' lands were withdrawn or classified as valuable for *oil and gas* because *oil and gas* prospecting permits covering the land had been issued by the Department. Moreover, those prospecting permits appear to have been issued under the 1920 Mineral Leasing Act, further supporting the Department's interpretation of "gas" and the court's conclusion that the

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[11] Another basis is that carbon dioxide gas and other nonhydrocarbon gases are, in fact, commonly found and produced in association with petroleum while, on the other hand, hydrocarbon gases are often produced from strata containing no petroleum. Pet App. 19a n.12.

Agricultural Entry Act and the 1920 Mineral Leasing Act must be read together in determining the scope of the word. Pet. App. 17a-18a. Petitioners' failure to build an administrative record sufficient to persuade the Court of Appeals that their lands had, in fact, been withdrawn or classified as valuable specifically for petroleum and petroleum *only*, does not constitute reversible error on the part of the court.[12]

B. Petitioners Demonstrate No Error in the Court of Appeals' Conclusion That Petitioners' *Ejusdem Generis* Argument Is Not Determinative.

Finally, petitioners contend that the Court of Appeals committed reversible error by concluding that the order in which (1) phosphate, (2) nitrate, (3) potash, (4) oil, (5) gas, and (6) asphaltic minerals are listed in the Agricultural Entry Act does not compel a construction limiting the word "gas" to mean fuel gas only. Pet. 17-20. The Court of Appeals analyzed petitioners' *ejusdem generis* argument carefully (Pet. App. 14a-16a) and found that it suffered from two major weaknesses.

First, the court observed that even if the structural argument advanced by petitioners were plausible,[13] other

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[12] Having failed to prove that their lands were the subject of petroleum-only withdrawals, petitioners now characterize this unsuccessful assertion as a "long-standing concession" on petitioners' part. Pet. 16. Surely petitioners "concede" too much.

[13] Although the Court of Appeals noted that petitioners' construction, if correct, would constitute overwhelming

(Continued on following page)

constructions are also plausible – while the six enumerated substances could be divided into the two groups of fertilizer minerals and fuel minerals, they could also be grouped together as nonmetalliferous minerals or read as six separate "classes" of minerals. Petitioners contend that a single grouping of nonmetalliferous minerals could not have been intended because the list does not exhaust the entire universe of nonmetalliferous minerals. Certainly the list does not exhaust the entire universe of fuel and fertilizer minerals either, but the significance of that observation is elusive, at best. Petitioners also deny that the list can be read to enumerate six separate substances of equal status. Why petitioners find this construction implausible is not clear, but this same lack of clarity highlights petitioners' failure to demonstrate that further review by this Court is required.

The second reason the Court of Appeals found petitioners' *ejusdem generis* argument less than compelling goes to the reliability of *ejusdem generis* as the sole indicator of Congress's intent. The court noted the manipulability of the rule and noted the fact that it was rejected as a rule of construction in the analogous case of *Northern Natural Gas, supra*. The court then asked the obvious

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(Continued from previous page)

evidence that "gas" was intended to *include* fuel gas, the court was not persuaded that this construction would *exclude* the noncombustible gases. Pet. App. 14a. Moreover, the court observed that petitioners' construction is undermined by *Brennan v. Udall, supra*, which held that "oil" as used in the Agricultural Entry Act is a term broad enough to encompass oil shale, a solid rock containing kerogen, but no petroleum. Pet. App. 15a n.9.

question why Congress did not simply refer to "fuel gas" in the statute rather than rely on the rule to limit the scope of the word "gas". Petitioners do not address this second criticism of their *ejusdem generis* argument, and their silence again highlights petitioners' failure to demonstrate why additional review by this Court is necessary.

CONCLUSION

Petitioners fail to demonstrate that the Tenth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

JAMES W. SPENSLEY
Counsel of Record

MARLA J. WILLIAMS
ERIN M. SMITH
HOLME ROBERTS & OWEN
1700 Lincoln Street, Suite 4100
Denver, Colorado 80203
(303) 861-7000

Attorneys for Intervenors-Respondents

APPENDIX A
BLM DECISION

(SEAL)

IN REPLY REFER TO

CO-943A(RD/WN)

C-39463

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
COLORADO STATE OFFICE
2020 ARAPAHOE STREET
DENVER, COLORADO 80205

Certified Mail

Recordable
Disclaimer
of Interest

DEC 17 1984

DECISION

Mr. Robert D. Lanier, *et al.*
c/o Stephen H. Muse, Esq.
Du Terroil, Muse & Shackleford
6122 Royal Creek
San Antonio, Texas 78239

Claim for Carbon Dioxide Mineral Rights
(The McElmo Dome) Considered as an Application
for a Recordable Disclaimer of Interest in Lands
APPLICATION DENIED
Request to Place Funds in Escrow Rejected

On January 9, 1984, Stephen H. Muse, Esq., on behalf of several alleged landowners within Dolores and Montezuma Counties, Colorado, presented to this office a claim that his clients own the carbon dioxide [hereafter CO_2] underlying their lands, particularly the CO_2 found in the Mississippian Leadville Formation within the McElmo Dome (Leadville) Unit[1] area, rather than the United States of America, which has for years, both

before and after the applicable patents were issued, been leasing the lands for oil and gas, including any CO_2 that may be in such lands, pursuant to the Mineral Lands Leasing Act of February 25, 1920 [41 Stat. 437], as amended, 30 U.S.C. §§ 181 *et seq.* (1982) [hereafter, MLLA].

GENERAL DESCRIPTION OF THE CLAIM FOR CO_2 RIGHTS

The original claim has been supplemented by supporting documentation filed on March 15, April 2, and May 7, 1984. The claimants seek through this material to have the Department of the Interior, acting through this office of the Bureau, declare that the claimants, whose title presumably derives from patents excepting and reserving oil and gas to the United States under the terms of the Act of July 17, 1914 [38 Stat. 509], as amended, 30 U.S.C. § 121 (1982) [hereafter the 1914 Act], are the true owners of the CO_2 underlying their lands, rather than the United States of America or its lessees.

The original list of the claimants and the lands subject to the claim, contained in the documents filed on January 9, 1984, was replaced by a revised list received on July 2, 1984. Additions to the revised list were received in this office on October 3 and 11, 1984, and a slight correction to the claimed land description for one claimant was received October 4, 1984.[2]

As the claim now stands, the claimants request that this office determine and declare that they are the owners of the CO_2 under 20,931.43 acres lying within 14 townships in Southwest Colorado either within or in close proximity

to the McElmo Dome (Leadville) Unit Agreement area.[3] Our records disclose that 20,043.39 of the acres embraced by the claim were patented by the United States under the homestead laws, excepting and reserving the oil and gas to the United States pursuant to the 1914 Act.[4]

Within the boundaries of the McElmo Dome (Leadville) Unit area, 15,990.05 acres are subject to the claim. Of that total, 15,742.01 were patented subject to a reservation of oil and gas pursuant to the 1914 Act. A review of the status plats maintained by our office shows that within the McElmo Dome (Leadville) Unit area, approximately 24,629.44 acres were patented subject to such a reservation of oil and gas. Thus, about 8,887.43 acres within the unit area are patented subject to the reservation of oil and gas under the terms of the 1914 Act, but are not included within the pending claim, although some of this acreage was contained on the original list of lands and claimants filed January 9, 1984.

Further review of the land status reveals that within a square of the 25 townships, from 36 to 40 North, Ranges 16 to 20 West, New Mexico Principal Meridian, where all of the present claimed land is located, about 46,614.47 acres were patented subject to an oil and gas reservation pursuant to the 1914 Act. Within this larger area, a total of approximately 26,571.08 acres would thus be subject to similar claims.[5]

The basic thrust of the claimants' presentation to this office is that their patents should be considered to convey to the original patentees the title to the CO_2 in their lands because Congress intended that the reservation encompass only "hydrocarbon" or "fuel" gases, rather than *any*

substance that might be considered a "gas." A voluminous amount of material, much bolstering the contention that CO_2 should not be considered a "gas" reserved pursuant to the 1914 Act, has been received from the claimants.

DETERMINATION OF THE OWNERSHIP OF THE CARBON DIOXIDE

After reviewing this material, however, and considering the enclosed advice from the Regional Solicitor,[6] who also considered all of the material submitted on behalf of the claimants dealing with the legal issue of CO_2 ownership, this office concludes that the United States holds all the right, title, and interest to any and all CO_2 within those lands in Colorado embraced by homestead patents which contain the following or any similar clause:

> Excepting and reserving, also, to the United States all oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 [38 Stat. 509].

Where, of course, the exception and reservation cover less than all of the lands in a particular patent, this determination of ownership affects only to that portion of the lands embraced by the exception and reservation.

CLAIM AS APPLICATION FOR DISCLAIMER OF INTEREST IN LAND

Procedurally, this office considers the claim to be an application to the United States to issue to the claimants a

recordable disclaimer of any interest to the CO_2 in the lands subject to the claims pursuant to Section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA) [90 Stat. 2770], 43 U.S.C. § 1745 (1982).

This application has been serialized with our serial number C-39463. All future correspondence and appeal material, if any, concerning this case should refer to C-39463 to permit expeditious processing. To the extent the claim includes lands subject to a patent reserving the oil and gas pursuant to the 1914 Act, the application for a recordable disclaimer of interest in the CO_2 in the claimed lands is denied.

This office has treated the claim as a single consolidated application of several claimants. In fact, the material presented amounts to about 140 separate applications. In the event the claimants eventually prevail and this office or the Department is ordered to issue disclaimers of interest in the CO_2 in the claimants' lands, the claimants will be expected to comply with all the requirements of the recently issued regulations in 43 CFR, Subpart 1864, appearing at 49 FR 35296, September 6, 1984, implementing Section 315 of FLPMA.

Each claimant or set of claimants would be expected to submit a filing fee of $100 for each portion of land within a single patent and demonstrate their title to the CO_2 by tracing their ownership from the original patentee. Additionally, the claimants will, if successful, be required to reimburse the Bureau for such processing costs as are required by the new regulations. This may possibly include costs incurred by this office on and after the effective date of the new regulations, October 9, 1984, if

this decision is eventually reversed and this office is ordered to issue disclaimers to the claimants. This office will review that cost issue only if this decision is overturned.

This office is not insisting on the requisite filing fee or processing costs for this consolidated claim as the bulk of the work relating to the present claim (application for disclaimer) was completed prior to the effective date of the new regulations at 43 CFR § 1864.1-2. All of such work should have been so accomplished but for the press of some other priorities.[7] In view of our determination that the claimants are not entitled to disclaimers of interest to the CO_2 in any event, requiring proof of the chain of title is unnecessary.

This office has been generous in allowing the substitution and addition of parties within the application. However, with the issuance of this decision, and considering the recent issuance of regulations implementing Section 315 of FLPMA, this office will not permit further additions to the lands or the claimants. Whether the Interior Board of Land Appeals will permit additions or modifications is, of course, within the discretion of that Board.

Unless otherwise ordered, however, this office will consider that any new potential applicant or lands not appearing on the list submitted July 2, 1984, as revised, must be processed separately pursuant to the recently promulgated regulations for any adjudication of CO_2 ownership. A failure to file any application for disclaimer promptly may subject the applicant to some of the procedural defenses such as laches or statute of limitations indicated later in this decision.

SPECIAL STATUS PROBLEMS WITH PORTIONS OF THE CLAIM

Four portions of the claim present unusual problems as our records indicate that the United States either does not now hold any title to the oil and gas in the lands encompassed by that portion of the claim or has never issued any patent to the land. As to one portion, the United States has previously passed any title to the minerals to the State of Colorado.[8] In another part of the claim, a small portion of the acreage includes lands where the United States patented the land without any mineral reservation.[9] A third portion of the claim encompasses lands where our records fail to indicate that any patent has ever been issued.[10] In the fourth portion with status problems, the United States did not reserve any minerals in the lands apparently claimed.[11] For the reasons set out in more detail in the footnotes, the claim is also rejected as to those lands although particular applications to issue a disclaimer of interest in the oil and gas, rather than the CO_2 alone, to proper parties may be entertained.

A fifth portion of the claim is contained in a patent which purports to reserve all coal and other minerals pursuant to the Stock Raising Homestead Act as well as oil and gas under the 1914 Act.[12] For reasons set forth in the footnote, we are treating that portion of the claim as being the same as other lands which are patented subject to the 1914 Act.

REASONS FOR REJECTION OF THE CLAIM/DENIAL OF THE APPLICATION

This office rejects the claim based primarily upon the reasoning indicated in the enclosed Opinion from the

Regional Solicitor, Rocky Mountain Region. A related Opinion from the Office of the Solicitor, Washington, D.C., issued a few days prior to the advice rendered on the claim itself, bolsters the authority of a brief earlier Opinion rendered by the Regional Solicitor to the effect that the United States holds the title to CO_2 where lands have been patented with a reservation of oil and gas pursuant to the 1914 Act, by partially relying upon the older Opinion to decide that the MLLA is the proper authority for issuing pipelines to carry CO_2.[13] The two 1984 Opinions were apparently written independently of each other to respond to different officials of this Bureau, but both provide authority for our conclusion that the United States owns the disputed CO_2, as does the earlier 1979 Opinion.

Given the tenuous nature of the basis for the claimants' or applicants' assertions, there is, we feel, an additional reason to reject the claim or application. If the doubts in this case were more evenly balanced, the administrative consequences of a determination in favor of the applicants should be of little concern. We perceive the claim to be extremely weak, however, and the severe administrative consequences that would follow a determination that the claim is valid further justify its rejection.

The Department of the Interior, normally acting through the Bureau of Land Management and its predecessor agency, the General Land Office, has for at least 40 years considered all oil and gas leases issued under the MLLA to convey to the lessee the right to develop all substances considered to be gases, with the exception of helium. Helium is specifically excluded from oil and gas leases as a result of the Act of August 8, 1946 [60 Stat. 950],

amending the MLLA, 30 U.S.C. § 181 (1982). No effort has been made, nor real thought given, to insuring that oil and gas leases be limited to specific types of land. Leases commonly embrace both patented lands where minerals have been reserved under one or more different acts and lands where the full fee title resides in the United States of America.

While leases have been restricted to include only either public domain or acquired minerals because there are distinct leasing laws for each type,[14] leases have never been delineated based upon surface ownership or the nature of the patent embracing particular lands. In short, reserved oil and gas have been treated, for the purposes of issuing and administering leases, as part of the original public domain mineral estate of the United States and no distinction made as to the basic rights of the lessee based upon the surface ownership, although the lessee may have differing obligations to the surface owners under the terms of various laws.

A determination at this late date that the United States is not vested with full title to all gases in the general oil and gas estate that it has so long considered to be part of the public domain would create chaos in the leasing process wherever lands patented, subject to the provisions of the 1914 or any similar act reserving oil and gas, exist. Serious questions would be raised as to the validity of such leases, especially where the lease has been extended by virtue of production of CO_2, whether such production stems from the land subject to the 1914 Act or some other portion of the leasehold. A ruling that the United States does not own the CO_2 in such lands would certainly complicate the issuance and administration of oil and gas

leases by the United States in order to avoid leases where the fundamental substances subject to the lease might vary in different parts of the leasehold. Absent a clear, positive basis for a determination that the landowner is the owner of the CO_2, the resulting complications should weigh in favor of ownership by the United States of America.

The foregoing hint of concerns is less than exhaustive.[15] Many claims and counterclaims may be generated should the claimants' basic contention eventually be determined valid, whether or not the United States itself is liable for any damages. While the present claim may not be strictly subject to the Act of October 25, 1972 [86 Stat. 1176], 28 U.S.C. § 2409a (1982), the nature of the problems that will be encountered seems to be at the heart of the twelve year statute of limitations in the law providing for quieting title to real property. Congress, no doubt, foresaw such complications arising from a failure timely to assert one's title. In the present case, however, this office is in no manner determining whether there may be any statutory or other legal bar to recognizing all or any part of the claim as valid; in view of our determination on the merits, no such review is necessary. We think, however, that all of these concerns are important in balancing the doubts that exist in this case. They should be of little weight if there were substantial doubt of the title of the United States to the CO_2. However, this office has concluded that the claim has little, if any, validity and these potential future problems are more than sufficient to erase any doubt favoring the claimants or applicants.

REQUEST FOR ESCROW OF FUNDS

As part of the claim presented on January 9, 1984, the claimants request "an accounting of all monies received from royalties, bonuses, lease payments, etc., received by the government and attributable to [the claimants'] lands" and demand "that all future royalties, payments, etc., of whatsoever kind and nature, received by the government on account of the [CO_2] in [the claimants'] lands be handled in accordance with the provisions of Section 28 'Loss of Title', of the Unit Agreement . . . " The request and demand are denied for the following reasons:

1. As we have determined that the claim is not meritorious, escrowing any funds will certainly delay the benefit of such funds to the General Treasury, the State of Colorado and other funds that are the beneficiaries of such revenues. Such a delay cannot be justified by the slight possibility that such revenues may later have to be accounted for to the claimants.

2. The escrowing provision in Section 28 of the Unit Agreement envisions situations where the validity of a particular lease interest is in doubt, not the fundamental title of the United States. Section 28's third paragraph acknowledges the potential dispute between some landowners and the United States about the ownership of the CO_2 but does not require the United States to escrow or suspend funds for the claimants or any other potential claimant.[16]

3. Even if the claimants are entitled to be considered the owners of the CO_2 in the lands in the claim, it is doubtful that they would be entitled to any of the royalties from the production because of the State involvement with the

unitization that effectively forcepools all private mineral interests in the Unit.[17]

4. Sorting out what portion of the revenues may be attributable to CO_2 would be particularly difficult where some of the leases covering the lands are producing oil and other gases. The leases in a purely rental status are presumably valid for oil and most gases, and should the claimants eventually prevail, it would be inappropriate to deprive the United States and the State of Colorado of that type of revenue, even though the lessees and other interested parties may have lesser rights than they envisioned.

5. As has been indicated earlier, should the claimants be determined to be the actual owners of the CO_2 in the lands covered by the claims, the very validity of the United States leases as to the claimants' lands would be questionable. The lessees and other deriving rights from such lessees would seem just as, if not more, entitled to the revenues that the claimants desire to have turned over to them. To the extent such lessees and other parties have removed CO_2 from the claimants' lands, they would seem equitably entitled to some compensation from the United States to help offset possible liability to any claimant or other parties for trespass removal of the CO_2.

6. In the unlikely event that the claimants eventually prevail, United States revenues from other portions of the McElmo Dome (Leadville) Unit should be sufficient to allow an equitable offset to permit payment of appropriate improperly collected revenues to the parties, if any, entitled to them. While the claimants may be entitled to a

large amount of compensation, should they be determined to own the CO_2, it is uncertain that the United States will be responsible for all or any part of such possible damages. Determination of such damages and the parties, if any, responsible for them, should await the unlikely event of the claimants' prevailing on the basic issue in this decision. Presumably the full faith and credit of the United States will be available to remedy damages for which it is determined to be liable. Although the damages may well be considerable, they are unlikely to be significant in comparison to the total revenues of the United States.

Accordingly, no action will be taken by this office to account for or cause the Department to hold in suspense or escrow revenues attributable to CO_2 in the claimed lands.

ADVERSE PARTIES

Should the claimants choose to appeal this decision to the Interior Board of Land Appeals, this office considers it appropriate that all of the lessees and holders of operating rights (commonly collectively called working interest owners, except for lessees without any operating rights) be treated as adverse parties. Additionally, parties with a likelihood of acquiring leases or interests in such leases in the near future as a result of bids, applications, or assignments should be treated as adverse. As the State of Colorado and some of its local governmental entities stand to lose their shares of the revenue received by the United States from the leases covering the claimants' lands and thus may also be adversely affected should the claimants

eventually prevail, this office is also naming the State of Colorado as an adverse party.

This would require service on such parties of any notice of appeal or appellate documents such as briefs, etc., and filing proof of such service with the Board of Land Appeals (not with this office). Whether any adverse party elects to participate in any appeal before the Board of Land Appeals is discretionary with that party. For purposes of the claimants' lands which lie within the McElmo Dome Unit Agreement, the only adverse parties that this office considers necessary to serve are the State of Colorado and the McElmo Dome Unit Operator, Shell Western E&P Inc. The unit operator is responsible for the interests of all Federal working interest owners within the unit area, and for purposes of this case may be considered their agent. Any effort by this office to delineate the identity of each working interest owner within the unit, even limited to those with interests in leases embraced by the claimants' lands, would generate unnecessary delay. Many, but not all, of those parties are the same as have been identified as adverse parties who must be served because of their interests in leases outside the unit area.

Service on the State of Colorado should be directed to the following, unless the State hereafter specifies another party for service:

Attorney General
State of Colorado
1525 Sherman Street
Denver, CO 80203

To the extent any appeal is taken as to any land claimed within the McElmo Dome (Leadville) Unit Area, the following party must be treated as adverse:

Shell Western E&P Inc.
P.O. Box 576
Houston, TX 77001

For those lands outside the McElmo Dome Unit Area, this office has identified as adverse parties at least 50 individuals and companies whose interests could be severely affected, if not destroyed, should the claimants prevail on their basic contention. These parties are identified on Enclosure 6 to this decision. Their interests are more fully spelled out on Enclosure 7 which identifies the nature of the party's interest in a particular lease and whether it covers the particularly described lands. In the event of an appeal, all of these parties must be served, except to the extent that any particular lands are excluded from the appeal and such exclusion has the effect of removing entirely the indicated lease from Enclosure 7.[18] This office is mailing a copy of this decision and its enclosures to each of the parties named on Enclosure 6, as well as the State of Colorado and Shell Western E&P Inc.

Unless this office is subsequently restrained by appropriate orders, routine adjudication of applications and assignments affecting the lands and leases covered by this decision will continue normally. To refrain from the processing of the assignments, as well as future assignments that can reasonably be anticipated to be executed and filed for approval, will generate an unnecessary backlog of such actions. As this office becomes cognizant of any additional parties that could be considered adverse, as a result of the *approval* of an assignment, this

office will notify both Stephen H. Muse, Esq., or any successor(s) to him and the potential adverse party of this decision and any pending appellate action of which this office is aware.

RELATIONSHIP OF THIS DECISION TO PRIOR COURT PROCEEDINGS

This decision is considered to be an initial administrative decision of the Bureau of Land Management of the type envisioned by Judge John L. Kane, Jr., in dismissing the case of *Dean Ives, et al. v. United States of America, et al.*, on March 25, 1981 in Civil Action 80-K-705, U.S.D.C. (D. Colo.). While that decision may have specifically contemplated a hearing as a result of a private contest and an administrative law judge's decision subject to an appeal to the Interior Board of Land Appeals, this office considers this decision to be of a comparable nature and to allow the plaintiffs in that court action to pursue their claim at the appropriate last administrative level within this Department. This decision may be appealed to the Interior Board of Land Appeals.

RESERVATION OF POTENTIAL PROCEDURAL DEFENSES

This decision has been directly concerned with the merits of the claimants' contention that they, as the current landowner, rather than the United States, hold the fundamental title to the CO_2 on their lands. This decision should not be construed as any waiver by the United States later to claim such procedural defenses as res judicata, laches, estoppel, or the statute of limitations against the basic contentions of the claimants or any of them.[19]

RIGHT TO APPEAL THIS DECISION

This decision becomes final 30 days from its receipt by Stephen H. Muse, Esq., or his representative, unless it is appealed pursuant to 43 CFR, Part 4, Sub-part E. See the enclosed Appeal Information Sheet (CSO 1840-3, October 1984).

/s/ Kannon Richards
Kannon Richards
State Director

Enclosures (8)
1-List of Claimants and Claimed Land (9 pages)
2-Chart Showing Affected Acreage (1 page)
3-Solicitor's Opinion, July 26, 1984 (10 pages)
4-Solicitor's Opinion, July 20, 1984 (8 pages)
5-Solicitor's Opinion, July 12, 1979 (3 pages)
6-List of Adverse Parties (2 pages)
7-Chart of Adverse Parties' Interests (13 pages)
8-Appeal Information Sheet (2 pages)

cc: Attorney General, State of Colorado
Shell Western E&P Inc.
Parties Named on Enclosure 6

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[1] The McElmo Dome (Leadville) Unit is a producing oil and gas unit formed under the authority of the MLLA, and approved by this office under the provisions of 43 CFR, Subpart 3180 (1983). The primary purpose of this unit is to extract the CO_2 from the Mississippian Leadville Formation underlying the unitized lands to be transported by pipeline to oil fields in Texas for injection to aid recovery of the remaining reserves. The unit embraces approximately 203,234.26 acres in Dolores and Montezuma Counties in Southwest Colorado. More than three-quarters of the land, approximately 154,638.98 acres, contains Federal oil and gas according to our records and nearly all of those lands, including all of that portion of the lands claimed by Mr. Muse's clients lying within the unit area, are

embraced in existing oil and gas leases issued by this office or the Department.

One major thrust of the claim is that the CO_2 in 15,990.05 acres within the unit, where this office has long considered the CO_2 to be part of the mineral estate of the United States, instead belongs to the claimants. The unit currently embraces approximately 242 Federal oil and gas leases including at least 115 leases containing some lands covered by the claim.

CO_2 was discovered within the boundaries of what is now the McElmo Dome (Leadville) Unit about 1950 on Federal lease Pueblo 058692 and production was apparently used for dry ice. Some older wells are not committed to the unit, as two portions of land within the southeast quadrant of the unit have been excluded from the unitization. During the 1970's, Shell Oil Company and Mobil Oil Corporation formed seven exploratory units for development of anticipated CO_2 reserves in the area. As expanded, these successful exploratory units were the basis for the McElmo Dome (Leadville) Unit, which might also be considered a consolidation of the prior units into a single development unit.

[2] The revised list of claimants and the land claimed, as supplemented, can be found at Enclosure 1.

[3] All of the lands subject to the claim are within eight miles of the boundaries of the McElmo Dome (Leadville) Unit. Some portions of the claim, especially those in T. 38 N., R. 16 W., N.M.P.M., are quite isolated from the rest of the claim. Enclosure 2 makes the spread of the claim somewhat more apparent, as do plats and maps in the case file prepared by this office to display the lands subject to the claim as well as other lands in the vicinity that would be subject to similar claims. The claimed lands, as well as the lands patented subject to the oil and gas reservation under the 1914 Act, generally lie in the eastern and northern portions of the unit or in close vicinity to the northern edge of the unit.

[4] The discrepancy between the acreage claimed and the acreage subject to the oil and gas reservation authorized by the 1914 Act is more fully explained at footnotes 8 to 11.

[5] A detailed acreage breakdown of the claimed land and land potentially subject to similar claims, by township and

relationship to the McElmo Dome (Leadville) Unit, is found at Enclosure 2.

[6] Memorandum from the Regional Solicitor, Rocky Mountain Region, to the State Director, Bureau of Land Management, Colorado, Subject, "Ownership of Carbon Dioxide in Reservation of Oil and Gas to United States," July 20, 1984, Enclosure 3.

[7] A principal author of this decision was requested by name by the Bureau to participate in a week-long session in Washington, D.C., to review comments on oil and gas adjudication handbooks in September and was also required to spend several other workdays in working on particular handbooks dealing with bonding and assignments.

[8] This portion of the claim, that of Arthur and Esther Wilson, Marie R. Wilson, the S. Glenn Wilson Estate, and Barbara Burke for the Paul Wilson Estate, to All, Section 16, T. 38 N., R. 16 W., N.M.P.M., consists of a land to which all right, title and interest have passed from the United States to the State of Colorado pursuant to Section 7 of the Act of March 3, 1875, admitting the Territory of Colorado into the Union as a State. Since the United States has no apparent title to any minerals in this land, it would be extremely inappropriate to issue any current disclaimer of interest in the CO_2 to such lands and create a cloud of title where there is no showing that one now exists.

[9] This second portion of the claim, that of Russell D. Brown, Mildred Maggert, and H. L. Posey to Tract 40 in T. 37 N., R. 19 W., N.M.P.M., covers the lands patented as Lot 2 of Section 4 of that township. The patent to that lot did reserve the oil and gas to the United States pursuant to the 1914 Act. However, a resurvey of the lands conducted after the patent issued revealed that Tract 40 overlaps or conflicts with Tracts 71A and 71D on the west to the extent of approximately 7.95 acres. As Tracts 71A and 71D were patented prior to Tract 40, with no mineral reservation, the United States does not now claim title to the oil and gas, much less the CO_2, in the conflict area. Realizing that the overlap between the two patents may cloud title as to the oil and gas within the area of overlap, this office would certainly entertain an application for a recordable disclaimer of interest as to the oil and gas in the conflict area.

However, the present claim seeks to acquire clear title to CO_2 within all of Tract 40 rather than a limited portion thereof. As the claim embraces all of Tract 40, it must be denied.

[10] This part of the claim, that of Fred G. and Virginia Cline, as to what would normally be described as W 1/2 SW 1/4, Section 17, T. 37 N., R. 19 W., N.M.P.M., officially described as Tracts 60A and 60B of the same township, embraces lands that appear to be fully within the public domain, so far as our records disclose. No patent embraces such lands. A homestead entry was once made for such lands, but was later closed without any patent issuance. Since the United States is the full fee owner of these lands, a disclaimer of any interest in the CO_2 would be most inappropriate and will not be issued.

[11] This part of the claim, that of Ursel and Louise Pribble to the NE 1/4 of Section 1, T. 38 N., R. 19 W., N.M.P.M., appears to cover Lots 5, 6, 11 and 12 of Tract 37 in that township. Those lands were patented with no mineral reservation to the United States. As it appears that the United States has no mineral interest in such lands, and this office can discern no cloud on the title to such lands, the claim is also denied as to these lands.

[12] This portion of the claim, that of Jerry Huskey, Pat Huskey and Gary Huskey to the SE 1/4 NE 1/4, the N 1/2 SE 1/4, and the SE 1/4 SE 1/4 of Section 8, T. 39 N., R. 19 W., N.M.P.M., is embraced by a patent apparently reserving to the United States all coal and other minerals in the lands subject to the Act of December 29, 1916 (Stock Raising Homestead Act) [38 Stat. 862], 43 U.S.C. §§ 291-302 (1982), repealed by Section 702 of FLPMA of 1976, except for Alaska, [90 Stat. 2787], as well as reserving all oil and gas under the 1914 Act. The duplicate nature of the reservation could raise some question as to what was reserved to the United States. A review of a copy of the Homestead Entry file for such lands discloses no basis for the "coal and other minerals" reservation and contains the entryman's consent to the reservation of oil and gas under the 1914 Act, indicating that the issuing office inadvertently used a patent form designed for Stock Raising Homestead Entries rather than the general Homestead Patent form that should have been used. Because of this apparent mistake,

this office is considering the claim as to these 160 acres (listed as 120 acres in the claim) to be the same as the vast bulk of the claim for purposes of rejection. The United States does reserve the right, however, in the event this decision is eventually found erroneous, to consider further whether the CO_2 in this portion of the claim belongs to the United States independently of the reservation under 1914 Act, *i.e.*, because of the apparent reservation under the Act of December 29, 1916.

[13] This Opinion, Enclosure 4, is a Memorandum from the Associate Solicitor, Energy and Resources, to the Director, Bureau of Land Management, Subject, "Authority for Carbon Dioxide Pipeline Rights-of-Way," dated July 20, 1984. The earlier Opinion, Enclosure 5, is more precisely a Memorandum from the Regional Solicitor, Rocky Mountain Region, to the State Director, Colorado, subject, "Reservation of Carbon Dioxide in Land Patent," dated July 12, 1979. The 1979 Opinion, which was more in the nature of informal advice to this office, was attacked in a lawsuit brought by several of the present applicants in 1980. The action was pursued in Federal District Court in Colorado but was eventually dismissed, in part at least, because of the claimants' failure to pursue appropriate administrative remedies within the Department. This decision constitutes an initial administrative decision by the Department concerning the claimants' basic contention that they own the CO_2 in certain lands. Further review is available within the Department as explained later in this decision. See Order of Dismissal, *Dean Ives, et al. v. United States of America, et al.*, Civil Action No. 80-K-705, U.S.D.C. (D. Colo.), March 25, 1981.

[14] The MLLA or the Acquired Lands Leasing Act of August 7, 1947 [38 Stat. 741], 30 U.S.C. §§ 351 *et seq.* (1982).

[15] Within the McElmo Dome Unit area, many of the leases or the claimed land have been extended by virtue of unit drilling in an effort to discover more CO_2 or by production of CO_2 on unitized lands, either as part of the McElmo Dome Unit or one of the several units that the McElmo Dome Unit replaced. If a lease containing both 1914 Act lands and unpatented lands or lands patented subject to the Stock Raising Homestead Entry Act was extended by drilling for or production of CO_2, would that portion of the lease covering 1914 Act lands expire at the end of the lease's primary term? Would

production of CO_2 from 1914 Act lands serve to validate the lease as to the other lands, even though there was no production from such other lands and even if the lessor does not own the basic title to the produced CO_2; *i.e.*, that produced from the 1914 Act lands?

This office foresees an extremely complicated review of all leases within the McElmo Dome Unit should a determination be made that the United States does not own the fundamental title to the CO_2 in the claimants' lands. If all or parts of leases are subsequently determined to have expired at an earlier time than to which rentals or royalties have been paid, complicated questions will arise as to disposition of the revenues collected erroneously and the liability of the United States and other governmental agencies benefiting from those monies. While statutes of limitations may dispose of some problems, payment of actual royalty revenues from the claimants' lands has only recently commenced.

The claimants' demand for an accounting, dealt with later in this decision, appears to be less than complete by assuming that only the revenues and bonuses collected by the United States are due to the claimants; if those bonuses and revenues were erroneously collected by the United States, they could just as logically be refunded to the parties paying them, and those parties, possibly together with the United States, might be liable in some manner to the claimants or other rightful owners of the CO_2 involved. The accounting for all revenues, should the claimants or others be determined to own the CO_2, will be further complicated by the State of Colorado Oil and Gas Commission Order approving the unitization and effectively forcepooling all private CO_2 interests in the unit area, at least as to the unitized formation.

Even the validity of the Commission's Order may be subject to question, should the United States not hold the basic title to the CO_2 in over 24,000 acres of the 203,234.26 acre McElmo Dome Unit. The Commission's Order was based upon the Unit Proponents' Certification that over 88 percent of the working interest ownership was committed to the agreement. If the percentage attributable to the leases covering 1914 Act lands within the unit area were subtracted, the Commission

may have not approved the unitization. The Commission's Order was also the primary basis upon which this Office approved the Unit Agreement, rather than the customary method of insuring that a requisite percentage of working interest owners voluntarily consented to the unitization for purposes of MLLA.

[16] The wording of Section 28 of the McElmo Dome (Leadville) Unit Agreement conforms, as to the first two paragraphs thereof, to Section 27 of the standard exploratory unit agreement found at 43 CFR § 3186.1 (1983). This language is designed to deal with situations where the working interest ownership of a Federal lease or the validity of a particular Federal lease is brought into question; it does not contemplate a loss of title by the United States. The first paragraph requires continued payment to the United States of revenues attributable to a lease in question, including portions that may exceed that to which the United States may be entitled, pending resolution of the question. The last paragraph of Section 28 of the McElmo Dome (Leadville) Unit Agreement acknowledges the outstanding or potential claims of the present claimants and others, recognizing that there may have to be a future accounting, but does not in any manner require that those revenues attributable to the claimed lands must somehow be suspended from normal treatment.

Moreover, even if the section could be read as requiring a suspension or escrow of the funds attributable to the [sic] any of claimants' lands, this office has no proof that all or any of the claimants are party to the Unit Agreement and entitled to claim any benefit therefrom. Finally, any benefits from the Unit Agreement could not be extended to lands not within the unit agreement; more than 20 percent of the claimants' lands fall outside the unit area.

[17] As this office generally understands the Commission Order, unleased private lands within the unit area, unless voluntarily committed to the applicable unit operating agreement, will gain no benefit from any unit production attributable to the lands until the Unit Operator has at least recovered the costs of developing the unit; since production has only recently commenced, full cost recovery does not appear imminent.

[18] Thus, if Robert D. Lanier decided not to appeal as to S 1/2, Section 5, T. 38 N., R. 16 W., N.M.P.M. (Item No. 1 on Enclosure 7), Bruce Anderson need not be served as he has no interest in any other lands on Enclosure 7. However, a determination by Howard L. and Elsie Bartley not to appeal this decision as to the S 1/2 SE 1/4, Section 15, T. 40 N., R. 19 W., N.M.P.M. (Item No. 30), would not remove Tenneco Oil Company from the list of adverse parties, as it also appears in the claims of Glen C. and Lois Hudgeons and James D. Harris for Harris Limited Partnership (Items No. 21 and 32). Any such determination not to appeal may have the effect of barring the claimants and their heirs and successors forever from pursuing any claim to the title to the CO_2, however. This decision should not be construed as encouraging a failure to appeal because of the administrative complexity of this case.

[19] Page 5 of the Opinion of the Regional Solicitor directed to the instant claims, Enclosure 3, refers indirectly to the late nature of the claimants' assertions by noting that the claims appear to have arisen only after the CO_2 discovery in an unknown area. Additionally, one of the claimants, Hazel Neely, previously made an application for a transfer of the mineral interest in her lands to the Montrose District Office of this Bureau; the application was eventually denied for her failure to comply with some requirements relating to the application. Whether that action estops the claim, so far as Hazel Neely is concerned, or amounts to res judicata, has not been considered by this office in acting on the present claim so far as the lands allegedly held by Hazel J. Neely and Dee Renay Neely. No exhaustive review has been undertaken to see whether any of the other claimants may have presented similar applications of this nature. This decision should not be construed as waiving any right by the United States to conduct further research to determine whether all or any part of the claim or application may be faulty because of an earlier failure to pursue a related application.

Supreme Court, U.S.
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No. 90-1225

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOE AULSTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

GEORGE W. VAN CLEVE
Deputy Assistant Attorney General

ROBERT L. KLARQUIST
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether oil and gas reservations to the United States in federal land patents pursuant to the Agricultural Entry Act of 1914, 30 U.S.C. 121-125, include deposits of carbon dioxide gas.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 915 F.2d 584. The opinion of the district court (Pet. App. 40a-44a) is not yet reported. The opinion of the Interior Board of Land Appeals in *Robert D. Lanier* (Pet. App. 45a-63a), which affirmed the unreported decision of the Bureau of Land Management (Int.-Resp. Br. Opp. App. 1a-24a), is reported at 93 Interior Dec. 66 and 90 I.B.L.A. 293. The opinion of the Interior Board of Land Appeals in *Irving L. Norton* (Pet. App. 64a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1990 (Pet. App. 36a-39a). On December 1, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and includ-

ing January 18, 1991, and on January 9, 1991, further extended the time for filing to and including February 17, 1991. The petition for a writ of certiorari was filed on January 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners own ranchland and farmland in southwestern Colorado. They hold the land under federal patents issued between 1922 and 1962 under the Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509 (codified as amended, 30 U.S.C. 121-125). Each of the patents contained a clause reserving either "oil and gas" or "oil, gas, potash and sodium" to the United States.[1] The reservations in the patents were included pursuant to Section 1 of the 1914 Act, which in relevant part provided:

> [L]ands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported

[1] A typical reservation reads as follows (Pet. App. 7a):

> EXCEPTING AND RESERVING TO THE UNITED STATES all oil and gas in the lands so patented, and to [the United States], or persons authorized by it, the right to prospect for, mine and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the [1914 Act].

> as valuable, together with the right to prospect for, mine, and remove the same.

38 Stat. 509. By 1984, virtually all of the oil and gas reserved in petitioners' patents had been leased by the Secretary of the Interior pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*[2] The lessees are intervenor-respondents in the present action. Int.-Resp. Br. Opp. 2.

Petitioners' lands overlie or adjoin a geologic formation known as the McElmo Dome, which was found in 1950 to contain a large amount of carbon dioxide. Carbon dioxide lacked significant commercial value until the 1970s, when, by its high pressure injection into oil wells, it proved useful for tertiary oil recovery. In the wake of this discovery, the leases covering petitioners' lands were, with the Secretary's approval, made part of a unit agreement devoted to the development of carbon dioxide production. Pet. App. 3a, 7a-8a, 47a n.2; see also Int.-Resp. Br. Opp. App. 2a-3a, 18a n.1.

In 1979, the Regional Solicitor of the Department of the Interior determined that the carbon dioxide in the McElmo Dome was "gas" for purposes of the 1914 Act and therefore had been reserved to the United States in petitioners' patents. Pet. App. 8a. That

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[2] Under Section 2 of the 1914 Act, the oil and gas reservations made in the patents are "subject to disposal by the United States * * * as shall be hereafter expressly directed by law." 38 Stat. 509. The Mineral Leasing Act of 1920 generally provided that "deposits of coal phosphate, sodium, oil, oil shale, or gas * * * owned by the United States * * * shall be subject to disposition" by the Secretary of the Department of the Interior. Ch. 85, 41 Stat. 437-438. The Mineral Leasing Act also specifically authorized the Secretary to issue oil and gas leases. § 13, 41 Stat. 441-442. See also Pet. App. 8a.

determination prompted three judicial proceedings, of which the present case is the third.

In 1980, petitioners filed a class action in the United States District Court for the District of Colorado, challenging the Regional Solicitor's determination and seeking compensation under the Little Tucker Act (28 U.S.C. 1346(a)(2)). Pet. App. 8a. That case, *Ives* v. *United States*, No. 80-K-705 (D. Colo., Mar. 25, 1981), was dismissed when the court determined that petitioners had failed to exhaust their administrative remedies and that their claims exceeded $10,000 and were therefore outside the district court's jurisdiction. Pet. App. 8a-9a.

Thereafter, petitioners applied to the Bureau of Land Management (BLM) in the Department of the Interior for a declaration that the United States claimed no ownership interest in the disputed carbon dioxide. See 43 U.S.C. 1745. The BLM denied that application, concluding that the United States owned the carbon dioxide in the Dome. The BLM based its conclusion in part on its determination that "for at least 40 years" the Department of the Interior has regarded "all [federal] oil and gas leases issued under the [Mineral Leasing Act of 1920] * * * to convey to the lessee the right to develop all substances considered to be gases, with the exception of helium." Int.-Resp. Br. Opp. 8a.[3] The BLM's ruling was affirmed by the Interior Board of Land Appeals (IBLA) in *Robert D. Lanier* (Pet. App. 45a-63a) and *Irving L. Norton* (Pet. App. 64a-65a). Pet. App. 9a.

Petitioners initially sought judicial review of the IBLA's decisions in the Claims Court, where they

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[3] The Mineral Leasing Act of 1920 expressly excepted helium from those gas deposits that the Secretary was authorized to lease. See 30 U.S.C. 181 (as amended).

also sought compensation for an alleged unconstitutional taking. The Claims Court held that it lacked jurisdiction to decide whether the United States had reserved the carbon dioxide for which compensation was sought. *Aulston* v. *United States*, 11 Cl. Ct. 58 (1986). The United States Court of Appeals for the Federal Circuit affirmed but directed that the case be held in abeyance. *Aulston* v. *United States*, 823 F.2d 510, 514 (1987). By then, petitioners had initiated their third, and present, court action in the United States District Court for the District of Colorado.

2. In the district court, petitioners sought review of the IBLA decisions under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*[4] The district court affirmed those decisions. It agreed with the IBLA that Congress did not express a clear intent in the 1914 Act on the issue whether carbon dioxide is a "gas" reserved to the United States. Pet. App. 42a, 43a. The court held that the IBLA's interpretation of the term "gas" to include carbon dioxide is "based on a permissible construction of the statute." *Id.* at 42a (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

3. The United States Court of Appeals for the Tenth Circuit affirmed. It ruled initially that proper resolution of the case is governed by this Court's decisions setting forth "the analysis a court undertakes when it reviews the validity of an agency's interpretation of a statute the agency is charged with administering." Pet. App. 11a (citing *Chevron U.S.A.*

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[4] Petitioners also sought a declaratory judgment that "the 'oil and gas' reserved to the United States by the [Agricultural Entry] Act of July 17, 1914 does not extend to carbon dioxide," and that they were entitled to a disclaimer by the United States of its interest in the carbon dioxide. First Amended Compl. para. 110, at 11.

Inc. v. *Natural Resources Defense, Inc., supra*, and *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990)).

The court first "employ[ed] traditional tools of statutory construction" (Pet. App. 12a) to "conclude that the text of the 1914 Act gives no indication whether Congress intended to prevent carbon dioxide gas from passing to the patentee" (*id.* at 16a). The court observed that in common usage "[t]he operative word 'gas' has numerous meanings" (*id.* at 12a), and that, even within the "legal and technical context of its commercial exploitation * * * the word 'gas' has meanings supporting both sides of this dispute" (*id.* at 13a).[5] The court rejected petitioners' argument that the structure of the 1914 Act evinced an intent to limit the meaning of "gas" to combustible hydrocarbon gas. Petitioner's structural argument—which posited an intent by Congress to reserve only "fuel minerals" and "fertilizer minerals"—raised the question "why Congress did not merely reserve 'fuel gas' " instead of using the unqualified term "gas." Pet. App. 14a.

The court of appeals also determined that "legislative and historical materials surrounding the enactment of the 1914 Act fail to clear up the ambiguity in the word 'gas' as employed in the 1914 Act." Pet. App. 23a. The court recognized that some "snippets of legislative history" relied upon by petitioners suggest that Congress was primarily concerned with reserving "fuel gas." *Id.* at 22a. But that term did not appear in the Act (*id.* at 14a n.7), and, in any event, use of that term by some government officials

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[5] In support of this observation, the court quoted definitions of "gas" and "natural gas" contained in United States Geological Survey material contemporaneous with the 1914 Act and in industry manuals and secondary legal sources. Pet. App. 13a n.6.

and legislators "reveals no clear [congressional] intent to reserve *only* hydrocarbon gas" (*id.* at 19a). Further, the court noted, other portions of the legislative history weigh against a restrictive reading of the statutory term "gas" (*id.* at 21a). Finally, the court reasoned, petitioners' interpretation is undermined by Congress's use of the term "gas" in the Mineral Leasing Act of 1920, where the term plainly included noncombustible gases like helium. Pet. App. 21a-22a.[6]

"Having concluded that Congress was silent on the question whether carbon dioxide is a 'gas' within the meaning of the 1914 Act," the court of appeals then addressed whether any deference is due to the Interior Department's 1979 interpretation of that term. Pet. App. 23a-29a. The court rejected petitioners' argument that no deference is warranted because the 1979 interpretation is not sufficiently "longstanding and consistent." *Id.* at 23a (quoting petitioners' brief). The court observed that the Department had no reason to adopt an interpretation "[u]ntil the inception of this dispute." *Ibid.* The court, however, rejected the government's contention that great deference is warranted in light of the Department's longstanding definition of the term "gas" to include non-

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[6] The court determined that the Mineral Leasing Act is relevant because it provided for disposition of the deposits reserved in the 1914 Act (Pet. App. 8a). Moreover, the Mineral Leasing Act "employed the word 'gas' in an enumeration comparable to the 1914 Act, [*i.e.*,] * * * 'coal, phosphate, sodium, oil, oil shale, or gas' " (*id.* at 21a-22a), while reserving to the United States "the right to extract helium from all *gas* produced from lands" leased pursuant to the Act (*id.* at 22a (quoting 41 Stat. 438) (emphasis added by court)). "The emphasized language has meaning," the court reasoned, "only if Congress understood 'gas' to mean the raw gas stream from a well, including both combustible and noncombustible components." *Ibid.*

combustible gases for purposes of the Mineral Leasing Act of 1920 (MLA), ch. 85, 41 Stat. 437 (codified as amended, 30 U.S.C. 181-287). Pet. App. 27a-29a. The court acknowledged that for at least 45 years the Department had consistently defined "gas" in the MLA to include noncombustible gases like carbon dioxide. *Id.* at 28a n.17; see also *id.* at 26a n.15 (citing Interior Department decisions and regulations). The court also recognized that the MLA and the 1914 Act were "substantially contemporaneous and interrelated statutes." *Id.* at 22a, 28a. These considerations, the court determined, warrant "some consideration" (*id.* at 28a) of the Department's definition of "gas" in the MLA. Because that definition and the Department's 1979 interpretation of "gas" in the 1914 Act are consistent, the latter interpretation is entitled to "[s]ome deference * * * under *Chevron*" (*id.* at 29a).

The court held that the Interior Department's interpretation is a permissible construction of the 1914 Act. Pet. App. 29a-35a. The Department's interpretation "certainly does not offend the statute's plain language, which simply refers to 'gas.'" *Id.* at 29a. Nor is the interpretation "inconsistent with the purpose and policy of the 1914 Act." *Id.* at 30a. The interpretation accords with "Congress's general purpose to ensure proper management and disposition of the reserved minerals, including gas, by retaining them in the public domain." *Id.* at 31a. It also fulfills Congress's intent "to put the United States government in a position to convey the same rights a [private] lessor of 'oil and gas' could convey to a lessee to enable the latter to 'prospect for, mine and remove the same.'" *Id.* at 33a (quoting 30 U.S.C. 122). Private lessees, the court noted have consistently been found to be "entitled to the raw natural

gas stream, whatever its chemical makeup." *Ibid.* (citing *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704, 715 (10th Cir.), cert. denied, 404 U.S. 951 (1971), and *Navajo Tribe of Indians* v. *United States*, 364 F.2d 320, 326 (Ct. Cl. 1966)).

The court mentioned two other factors supporting its conclusion that Interior's interpretation is rational and consistent with the purpose of the 1914 Act. First, because the interpretation allows lessees to use carbon dioxide to enhance recovery of oil, it furthers the statutory purpose to "conserv[e] the nation's fuel resources." Pet. App. 34a. Second, in their use for oil recovery, "[h]ydrocarbon gas and the carbon dioxide here in question * * * serve parallel functions to some extent, a fact well known during the era of the 1914 Act's enactment." *Ibid.* (citing J. Lewis, *Methods for Increasing the Recovery from Oil Sands*, 148 Bureau of Mines Bull. 90 (Dep't of Interior 1917)). Thus, notwithstanding petitioners' insistence that Congress discerned a significant difference between combustible and noncombustible gas, with respect to "[gas's] utility in oil recovery, its combustibility is irrelevant." *Id.* at 35a.

ARGUMENT

The court of appeals properly applied the analysis set forth in *Chevron*, *supra*, to review the Department of the Interior's interpretation of "gas" in Section 1 of the Agricultural Entry Act of 1914. The court correctly concluded that the Act is ambiguous with respect to the issue presented here—whether "gas" includes carbon dioxide—and that the Department's construction of that term to include carbon dioxide is rational and consistent with the Act. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 7-8, 10-13) that the court of appeals' reliance on *Chevron* violates a rule

against "retroactive deference" (Pet. 13). As petitioners envision it, this rule would compel courts to ignore an agency's interpretation of a statute if the interpretation concerns statutory language that also appears in contracts between the government and individuals executed before the interpretation is adopted. Pet. 11. Petitioners cite no legal authority for such a rule. See *id.* at 7-8, 10-13. In fact, no such rule exists, and this case provides no occasions for fashioning it.

Petitioner's proposed rule clearly does not apply to the authority of courts to construe statutes affecting federal patents. Courts often construe federal statutes authorizing conveyances of property to determine rights under the conveyances. For example, in *Swendig* v. *Washington Co.*, 265 U.S. 322, 332 (1924), the Court held that a government patent was ineffective to transfer property interests that Congress required to be reserved in the underlying statute. The Court construed the patent to include the reservation even though it was not included in the text of the patent. *Ibid.* See also, *e.g.*, *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36 (1983) (construing Stock-Raising Homestead Act of 1916, ch. 9, 39 Stat. 862, 43 U.S.C. 291 *et seq.*, to hold that gravel was included in the "coal and other minerals" reserved in government patents); *United States* v. *Washington Co.*, 233 F.2d 811, 817 (9th Cir. 1956).

Petitioners argue that, in resolving an issue of statutory interpretation affecting federal patents, a court may not consider an agency's interpretation. This argument is premised on petitioners' assertion that, unlike courts, agencies are always "free to reinterpret the statute in other permissible ways at later times" (Pet. 8). That assertion is incorrect and irrelevant here.

Neither courts nor agencies have unlimited discretion to abandon prior interpretations if doing so upsets settled expectations under a federal conveyance. For example, this Court rejected an attempt by the Department of the Interior to reverse its prior interpretation so as to nullify rights previously recognized under a conveyance. See *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 663-673 (1980).[7] The Court has applied similar limitations to judicial decisionmaking. *United States* v. *Title Ins. Co.*, 265 U.S. 472, 486-487 (1924) (courts may not "vacillate and overrule their own decisions on the construction of statutes affecting the title to real property").

No such problem arises in the present case. The Department of the Interior did not issue an interpretation of the term "gas" in Section 1 of the 1914 Act until 1979. As the court of appeals observed, the Department had no reason to do so until then. Pet. App. 23a. The Department was not foreclosed from considering the issue by the passage of time. Nor was the Tenth Circuit barred from according "[s]ome deference" (Pet. App. 29a) to the Department's resolution of this issue. Indeed, the courts have consistently accepted the Department's interpretation of the public land laws if they are "admissible," even if they are "not the only reasonable construction of" them. *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921), quoted with approval in *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965); see also Pet. App. 27a.[8]

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[7] The Department similarly recognizes limits on its discretion to revise prior interpretations of statutes authorizing federal conveyances. *Sun Exploration & Production Co.*, 112 I.B.L.A. 373, 391-392 (1990).

[8] As discussed, the court of appeals took into account the fact that the Department's interpretation of "gas" in the 1914

Petitioners conceded in the court of appeals that the 1979 interpretation by Interior of "gas" in the 1914 Act did not reverse any prior interpretation of the statute.[9] Accordingly, in this Court petitioners merely speculate (Pet. 12) that the Department may change its interpretation in the future and that such a hypothetical change could upset expectations arising from the 1979 interpretation. *Ibid.* Petitioners' speculation provides no basis for disregarding the Department's current interpretation. Nor does it provide a basis for further review of this case.

2. Petitioners renew their contention (Pet. 14-22) that the 1914 Act "clearly and unambiguously" reserved only "fuel gas" to the United States. The court of appeals correctly rejected that contention.

Here as in the court of appeals, petitioners' primary argument is based on the structure of the 1914 Act. Petitioners claim (Pet. 17) that the substances enumerated in Section 1 of the Act fall into two categories: "fertilizer minerals" and "fuel minerals." The term "gas," their argument goes, is placed between two terms that they believe refer to "fuel minerals." Based on this classification scheme, petitioners conclude that "gas" must also be a "fuel min-

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Act was not contemporaneous with the statute. The court accorded it "some deference" (Pet. App. 29a), however, because it was consistent with the Department's long-standing interpretation of that term in Section 1 of the MLA. The court's approach was proper in light of the close interrelation between the 1914 Act and the MLA. As this Court has recognized, the 1914 Act and the MLA should "be read together—each as a complement to the other." *Kinney-Coastal Oil Co.* v. *Kieffer*, 277 U.S. 488, 504 (1928).

[9] See Pet. C.A. Br. 35 ("[T]here is no longstanding and consistent agency policy of defining carbon dioxide to be 'gas.'").

eral," and therefore exclude noncombustible gases such as carbon dioxide. Pet. 17-18.

The court of appeals correctly identified the defects in this *ejusdem generis* argument.[10] It requires a compound inference: "[1] that Congress actually considered the combustible and noncombustible components of naturally occurring underground gas and [2] expressed its intent to reserve only combustible gas by its choice of the sequence in which the reserved minerals were listed." Pet. App. 14a. The court of appeals properly wondered "why Congress did not merely reserve 'fuel gas' in lieu of relying on *ejusdem generis*." *Ibid.* The court correctly determined that, while plausible, petitioners' classification theory does not furnish a "clear indication" of congressional intent.[11]

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[10] Although petitioners omit the term in their petition, in the court of appeals they based the same argument upon "[t]he principle of *ejusdem generis*." Pet. C.A. Br. 16-17.

[11] As the court of appeals observed, "the rule of ejusdem generis has had little application in cases dealing with oil and gas." Pet. App. 16a (internal quotation omitted). This Court has similarly declined to apply the rule in construing federal statutes concerning natural resource allocation. See *Western Nuclear*, 462 U.S. at 44 n.5. See also *Brennan* v. *Udall*, 251 F. Supp. 12, 24-25 (D. Colo. 1966), aff'd, 379 F.2d 862, 806 (10th Cir.), cert. denied, 389 U.S. 975 (1967), in which the court construed a patent reserving "oil" under the 1914 Act to reserve oil shale, a solid rock that is chemically distinct from petroleum oil. Accord *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704, 711 (10th Cir.), cert. denied, 404 U.S. 951 (1971). The court of appeals here observed that prior decisions rejecting the argument that the term "oil" in the 1914 Act is a specific term further weighed against reliance on the rule of *ejusdem generis* in interpreting the term "gas," since the rule applies only when a general term follows specific terms. Pet. App. 14a n.8, 15a n.9.

The court of appeals was also correct in concluding that the "snippets of legislative history" relied on by petitioners do not show clear congressional intent to restrict the meaning of "gas" in the 1914 Act. Pet. 16a-23a. Petitioners do not repeat their legislative history arguments here. They merely assert (Pet. 21) that considerations "extrinsic" to the statute do not "overcome the force" of their text-based argument. As explained, petitioners' text-based argument was properly rejected.

In determining whether Congress clearly spoke to the issue here, the court of appeals examined legislation related to the 1914 Act, including the Mineral Leasing Act of 1920. That approach accords with this Court's specific recognition that the 1914 Act and the MLA should "be read together—each as a complement to the other." *Kinney-Coastal Oil Co.* v. *Kieffer*, 277 U.S. 488, 504 (1928). Concomitantly, however, the court here avoided undue reliance on related legislation: "If anything, a comparison of the term 'gas' as used in related statutes favors a generic construction of the term, although we believe it equally likely that Congress had no intent whatsoever concerning carbon dioxide gas." Pet. App. 23a. Thus, the court did *not*, as petitioners contend, conclude that the Mineral Leasing Act "should be read *in pari materia* with the 1914 Act" (Pet. 21).[12] The court's limited reliance on the Mineral Leasing Act

[12] Petitioners do not otherwise dispute the court of appeals' view (Pet. App. 22a) that "substantially contemporaneous and interrelated" statutes such as the Mineral Leasing Act are relevant in interpreting the 1914, nor could they. See, *e.g.*, *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 57-59 (1983) (interpretations of general mining laws are "highly pertinent" to interpretation of Stock-Raising Homestead Act of 1916).

faithfully applied this Court's teaching in *Chevron*, 467 U.S. at 843 n.9, that courts should employ all "traditional tools of statutory construction" to discern whether Congress "had an intention on the precise question at issue."

In addition to mischaracterizing the court of appeals' reliance on the MLA, petitioners renew their contention (Pet. 22) that "gas" leased under the MLA includes noncombustible gas only if the gas occurs as an impurity commingled with combustible gas. On this basis, they argue that, even if Congress intended the meaning of "gas" in the MLA and in the 1914 Act to be the same, the carbon dioxide here would not have been reserved because of its high purity. The court of appeals properly declined to adopt petitioners' interpretation, observing (Pet. App. 34a) that it would implausibly "mak[e] property rights to different chemical components of natural gas dependent on the level of purity (or impurity) of the gas."

3. Finally, petitioners claim (Pet. 15-16) that, even if Congress intended in the 1914 Act to reserve noncombustible gas such as carbon dioxide to the United States, the carbon dioxide in their land could not have been reserved. Petitioners rely on the absence of evidence that the land covered by their patents was "withdrawn, classified, or reported as valuable on account of carbon dioxide" (Pet. 15). This contention, too, is unpersuasive.

Petitioners acknowledge (Pet. 16) their "long-standing concession" that their lands were withdrawn or reported as valuable for "oil and gas." See also C.A. Br. 19. The IBLA found no evidence concerning the type of "gas" on account of which petitioners' lands were withdrawn or reported as valuable. Pet.

App. 53a n.6. The absence of evidence does not, as petitioners would have it (Pet. 15), compel acceptance of their claim that the type of gas was exclusively "fuel gas." Hence, if, as petitioners contend, historical evidence would have been pertinent to determine why petitioners' land was deemed valuable, the absence of such evidence in this record is an additional consideration weighing against further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

GEORGE W. VAN CLEVE
Deputy Assistant Attorney General

ROBERT L. KLARQUIST
DIRK D. SNEL
Attorneys

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No. 90-1225

IN THE

Supreme Court of the United States

October Term, 1990

JOE AULSTON and LOLA AULSTON; HOWARD L. BARTLEY and ELSIE BARTLEY; VIRGINIA BASSETT; ROGER A. BIGLER, Trustee; BARBARA BURKE, Trustee for PAUL WILSON Estate;
Petitioners,

(Additional Petitioners are listed inside front cover.)

vs.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; MANUEL LUJAN, JR., in his Official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; CY JAMISON, in his official capacity as Director of the U.S. Bureau of Land Management; H. ROBERT MOORE, in his official capacity as Colorado State Director of the Bureau of Land Management,
Respondents,

and

SHELL WESTERN E & P, Inc.; CONOCO, INC.; VINCENT J. DUNCAN; RAYMOND T. DUNCAN; ELECTRA INVESTMENT; SYNERGY EXPLORATION, CO.; GULF OIL CORP.; MOBIL PRODUCING TEXAS/NEW MEXICO; MCO RESOURCES, INC.; ESTATE OF WALTER DUNCAN; TIDELANDS ENERGY CO.; UNIVERSAL RESOURCES CORP.; LENDON CO.; DUNCAN ENTERPRISES, INC.; JUSTIN R. MEYER; BARBARA L. MEYER; PHILLIPS OIL CO.,
Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

GARY LAWSON
357 E. Chicago Avenue
Chicago, Illinois 60611
(312) 503-0306

ROBERT H. BORK
Counsel of Record
1150 17th Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 862-5800

LUKE J. DANIELSON
Gersh & DANIELSON
1775 Sherman Street, Suite 1875
Denver, Coloardo 80203
(303) 863-1115

STEPHEN H. MUSE
5919 Winding Ridge
San Antonio, Texas 78239
(512) 655-7559

Attorneys for Petitioners

Batavia Times Publishing Co.
Batavia, New York (716) 344-2000

(Additional Petitioners.)

STANLEY E. BREWER and REGINA BREWER; CHARLES H. BROUGHER and BESSIE C. BROUGHER; RUSSELL D. BROWN; LEON CASSADAY and FLOSSIE E. CASSADAY; FRED G. CLINE and VIRGINIA CLINE; MICHAEL T. COKER and FRANKIE J. COKER; W.T. COKER and EDNA B. COKER; DENVER DALY and FLORENCE DALY; H.L. DUNCAN; THELMA DUNCAN; L.E. FRAKA and WANDA FRAKA; JOE P. FULKS; THELMA B. GARWOOD; RAYMOND G. GERLACH and JANET G. GERLACH; R.C. GERLACH and LOIS GERLACH; JAMES D. HARRIS as General Partner for Harris Limited Partnership; HARRIS LIMITED PARTNERSHIP; HAROLD F. HENSLEY; GEORGE L. HERREN and VIOLA HERREN; OLIVE V. HODAPP; ROBIN R. and BETTY J. HOLLEN, JR.; GLEN C. HUDGEONS and LOIS M. HUDGEONS; LORETTA B. HUNTER; JERRY HUSKEY and PAT HUSKEY and GARY HUSKEY; CARMEN IVES, IVES FARMS, INC.; ROGER D. IVES and SUSAN IVES and SHERYL A. IVES; W.L. LANCASTER and LOIS LANCASTER; LANIER FARMS, INC.; ROBERT D. LANIER personally and as President of LANIER FARMS, INC.; RHODA E. LEGG; IVA LINDBACK; MILDRED MAGGART; O. WAYNE MAGNESS and JEAN MAGNESS; LENA MARRS; OSCAR J. MARTIN and WANETA MARTIN; LAWRENCE and NANCY McGRATH; EDMUND L. MURPHY and CAROLINE MURPHY; ROBERT L. MUSTOE; IVAN W. NEELY and ELIZABETH ANN NEELY; HAZEL J. NEELY and DEE RENAY NEELY; PHYLLIS C. NICHOLS; IRVING L. NORTON and DANA NORTON; LEROY W. OLIVER and ELLEN OLIVER; TROY OLIVER; SHORLENE OLIVER; TOMMY W. PEDIGO and IMA JEAN PEDIGO; GALA FERN POCK; JOHN E. POCK and RITA L. POCK; ALBERT S. PORTER; H.L. POSEY; URSEL PRIBBLE and LOUISE PRIBBLE; CLIFFORD D. RAGSDALE and EDITH L. RAGSDALE; GRADY RAGSDALE and JEAN RAGSDALE; WAYNE A. RAMSEY and GLADYS E. RAMSEY; JOE F. RANDOL and LOIS J. RANDOL; DAISY M. REED; JOHN B. REED; HENRY S. ROWEN and BEVERLY ROWEN; BEATRICE G. SEELIG; W.E. SPEER and PATSY SPEER; THERON O. STORY; JIM TEBBS; WILLIAM A. THOMPSON, JR.; CLARENCE R. UPTAIN and LULA BELLE UPTAIN; LLOYD W. WALLACE; PAT WARREN and RUBY WARREN; WILLIAM WASCHKE and VIOLET WASCHKE; ERNEST WATKINS and GENEVA WATKINS; BILLY D. WATSON; DONALD H. WHITE and ISABELL M. WHITE; HENRY M. WHITE and GOLDIE WHITE; BRAD E. WHITE and PAMELA KAY WHITE; WAYNE E. WHITE and BESSIE M. WHITE; DOROTHY F. WILLBANKS; AARON C. WILLIAMS; ARTHUR WILSON and ESTHER WILSON and MARIE WILSON; CLARA A. WOODMANSEE; RODGER D. WORTHY and ELIZABETH ANN WORTHY; ROBERT YOUNG and OLIA YOUNG,

Petitioners,

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IN THE

Supreme Court of the United States

October Term, 1990

No. 90-1225

JOE and LOLA AULSTON, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

and

SHELL WESTERN E & P, *et al.*,
Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

I. Introduction

In our petition, we demonstrated that this case presents two significant questions, each of which is independently worthy of review. First, we demonstrated that in construing land patents which incorporate language from the Agricultural Entry Act of 1914, the Court of Appeals improperly gave deference to an Interior Department interpretation of the 1914 Act made decades after the land patents were executed. We showed that a reasonable agency interpretation of the 1914 Act can bear on the meaning of documents which incorporated the statute's language *after* that interpretation was promulgated, but that it cannot sensibly affect the meaning of land patents or other documents that were fully executed long *before* the agency's interpretation was announced.

Second, even assuming that deference to the Interior Department was appropriate, we pointed out two distinct and serious defects in the agency's conclusion that "oil and gas" reservations in petitioners' land patents give the United States ownership of carbon dioxide deposits located beneath petitioners' lands. First, the 1914 Act authorizes reservations to the United States only of those minerals "on account of which the lands were withdrawn [from homesteading]. . . ." 30 U.S.C. §121 (1988). In view of the agency's own finding that there is "no evidence that the land involved herein was withdrawn . . . on account of carbon dioxide," Pet. App. 53a n.6, we are still wondering how we could possibly have lost this case. Second, we argued that the term "gas," as it is used in the 1914 Act and petitioners' patents, refers only to natural gas, not to nonfuel gases like CO2.

Finally, and perhaps most importantly, we demonstrated that both questions are of enormous significance. The first question has obvious relevance for

any circumstance in which statutory or regulatory language is incorporated into a separate legal instrument. The second question substantially affects the administration of the nearly 5.5 million acres of land subject to federal "oil and gas" reservations. This case alone involves more than 15,000 acres of land and approximately $500,000,000.00 worth of deposits.

II. Question One

As they have done throughout this proceeding, the government and intervenors adopt a strategy of misdirection. This is particularly evident with respect to our arguments concerning Question 1 of our petition,[1] to which neither the government nor the intervenors offer a direct response. Instead, they seek to recast the question in a form more to their liking, and as a result spend much of their energy fencing with shadows.[2]

Our point here is a simple one, notwithstanding the respondents' determined efforts to obscure it. A land patent is executed (let us say in 1922), containing a reservation to the United States of all "oil and gas" located beneath the land. The "oil and gas" reservation is included pursuant to the terms of the Agricultural Entry Act of 1914, and both the landowner and the

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[1] "When determining the meaning of legal documents which incorporate preexisting statutory language, may courts properly defer to agency interpretations of the underlying statute that are made *after* the documents are executed?" Pet. i.

[2] Unfortunately, this tactic served the respondents well in the lower courts. Their dogged refusal to address our argument that post-patent interpretations are not entitled to deference no doubt helped induce the Court of Appeals to conflate this argument with the very different claim (which we also advanced below but do not press in this petition) that the agency's 1986 interpretation was inconsistent with its prior interpretations of "gas" in other contexts, and was therefore not entitled to deference in fact even if it could be entitled to deference in principle. *See* Pet. App. 24a.

government agree that the terms "oil" and "gas" have the same meaning in the patent as in the statute. At the time the patent is executed, the agency charged with administering the 1914 Act has not offered an interpretation of the statute that is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Some time after the patent is executed, however, the agency offers an interpretation of the term "gas" in the 1914 Act that satisfies all of the criteria for *Chevron* deference, including (we will assume for the moment) substantive reasonableness. Does that agency interpretation have any proper bearing on the meaning of the fully executed patent?

The answer, we submit, is obviously no. When the patent was executed, it vested title to particular minerals beneath the patented land in either the patentholder or the government, depending upon the proper interpretation of the patent reservation and the 1914 Act. In either case, that title was *definitively vested in 1922*; at that point in time, the reservation took on the meaning of the statute as it then stood. If in 1921 the agency had provided a *Chevron*-quality interpretation of the 1914 Act, then at the moment at which title to the minerals vested, the statute, and hence the patent reservation, would have meant what the agency at that time reasonably interpreted it to mean. But in the absence of a definitive agency interpretation in 1922 (or whenever else the patent was executed), the reservation took on, not some later-to-be-determined permissible meaning of the statute, but the *best* meaning of the statute—just as any court construing a statute in the absence of a *Chevron*-quality agency interpretation must search for the statute's best meaning. If the agency later (for example, in 1923) promulgates a binding administrative interpretation, that interpretation prospectively affects the meaning of the statute, but it

cannot alter the meaning of the fully executed land patent which incorporates the statute. That meaning—whatever it may be—was fixed at the moment of execution. Since in the case at bar the Interior Department did not interpret the word "gas" in the 1914 Act until many years after the last of petitioners' patents were executed,[3] the meaning of petitioners' patent reservations should have been determined without giving deference to that interpretation.

The argument is unanswerable, which no doubt explains why respondents do not answer it. The only response by the government that rises to the level of an argument is its claim that our analysis "is premised on [the] . . . assertion that, unlike courts, agencies are always 'free to reinterpret the statute in other permissible ways at later times,' " Brief for the United States in Opposition at 11, which assertion the government argues is neither true nor implicated by the facts of this case. *See id.* at 10-12.[4] This badly misses the mark. Obviously, our argument is not "premised" on any such proposition. As set forth above and in our petition, *see* Pet. 7-8, 10-11, our analysis is "premised" on elementary, bedrock principles of administrative law. We introduced the spectre of a flip-flopping agency only to illustrate one of the many absurd consequences that flow from the Court of Appeals' erroneous approach to

[3] The Interior Board of Land Appeals announced its interpretation of the statute in 1986. The Regional Solicitor for the Department of the Interior offered the same interpretation in 1979. We believe that only the former interpretation is sufficiently the product of "the agency" to be entitled to *Chevron* deference, but since the last of petitioners' patents were executed in 1962, nothing whatsoever turns on this point.

[4] The remainder of this portion of the government's response points out that we are asking this Court to enunciate our proposed deference rule for the first time, and that nothing we say affects the power of courts to construe land patents. *See* Brief for the United States in Opposition at 10. We happily accede to both propositions.

administrative review. We emphatically stand by our spectre,[5] but it is incidental to our *substantive* argument, which the government has simply refused to address.

The intervenors are even further off line. As best as we can discern, their argument on this score is twofold: they contend (1) that our analysis wrongly assumes that the Interior Department's interpretation of the 1914 Act constituted a change of position, *see* Brief for the Intervenors-Respondents in Opposition to Petition for Writ of Certiorari at 11-12, and (2) that the Interior Department's 1986 interpretation of the 1914 Act was foreshadowed by prior interpretations of the term "gas" in related legislation, such as the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§181-287 (1988)), and cannot be viewed in a vacuum, *see* Brief for the Intervenors-Respondents in Opposition to Petition for Writ of Certiorari at 8-10.

The first argument, as noted above, seriously misstates our position before this Court. We make no claims in our petition about the Interior Department's pre-1986 view of the 1914 Act, and indeed we expressly endorse and rely upon the Court of Appeals' conclusion

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[5] It is surely true that effect on settled expectations would be a factor to consider in assessing the reasonableness under *Chevron* of an agency's (re)interpretation of a statute. Under established principles of administrative law, however, such reinterpretation would be permitted if "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles," *SEC v. Chenery Corp.*, 332 U.S. 194; 203 (1947), outweighs "the ill effect of the retroactive application of a new standard." *Ibid.* If a different rule exists for administrative interpretations affecting mineral rights, it was certainly not announced in *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980), *see* Brief for the United States in Opposition at 11, which reversed an agency reinterpretation of a statute because the original interpretation was *correct*, not because the reinterpretation affected settled expectations. *See* 446 U.S. at 673 ("We conclude that the original position of the Department of the Interior . . . is the correct view of the Mineral Leasing Act as it applies to the patentability of these claims").

that "[u]ntil the inception of this dispute, the Department of the Interior had no occasion to determine explicitly whether carbon dioxide is 'gas' within the meaning of the 1914 Act." Pet. App. 23a-24a. It is irrelevant to this argument whether the agency's post-patent interpretation was or was not a revision of a prior interpretation; all that matters is whether the interpretation under review was announced before or after the patents were executed. If the latter, then no deference is appropriate—period.

Their second argument misses the point even more badly. The existence *vel non* of prior agency interpretations of "gas" in related legislation is relevant to determining whether the Interior Department's 1986 interpretation of the 1914 Act was *reasonable*—that is, it is relevant to determining the proper amount of deference on the assumption that some measure of deference is appropriate. It has no relevance whatsoever to determining whether deference is appropriate in the first instance. It is elementary that for an agency interpretation to be entitled to *Chevron* deference, it must be an interpretation of the particular statute under review.[6] The conclusion that there was no such interpretation of the 1914 Act extant prior to 1986 (and therefore no such interpretation extant when petitioners' patents were executed) is therefore dispositive of the question whether deference should have been granted in this case.

In sum, our demonstration that the Court of Appeals has announced and applied a new, erroneous, and potentially disastrous principle of administrative review has gone essentially unchallenged—as it did in the lower courts. Review is clearly warranted.

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[6] Indeed, this proposition is so elementary that we cannot find a case that has had occasion explicitly to announce it.

III. Question Two

Review is also warranted on Question 2.[7] Crucially, the respondents do not deny that this question is of enormous importance to the administration of the public lands. That is itself sufficient reason for this Court to grant certiorari and provide a definitive resolution.

In response to our argument that the plain meaning of the 1914 Act establishes that "oil and gas" reservations do not include CO2, the respondents simply repeat the analysis offered by the Court of Appeals, which we addressed at some length in our petition. *See* Brief for the United States in Opposition at 12-15; Brief for the Intervenors-Respondents in Opposition to Petition for Writ of Certiorari at 16-18, 20-22. Because we are seeking plenary review rather than summary reversal, we see nothing in these arguments that warrants an additional response.

The respondents' answer to our claim that CO2 could not in any event have been reserved in petitioners' patents because it was not a mineral "on account of which the lands were withdrawn," 30 U.S.C. §121 (1988), is equally feeble. The government's response is contained entirely in one baldly asserted sentence: "The absence of evidence [that petitioners' lands were withdrawn on account of CO2 deposits] does not, as petitioners would have it (Pet. 15), compel acceptance of their claim that the type of gas [reserved in the patents] was exclusively 'fuel gas.' " Brief for the United States in Opposition at 16. Oh yes it does.

Under the terms of the 1914 Act, the proper scope of a mineral reservation is strictly determined by the scope of the prior withdrawal from homesteading. If land was

[7] "Do land patents which reserve 'oil and gas' interests to the United States pursuant to the Agricultural Entry Act of 1914 also reserve to the government deposits of carbon dioxide found beneath the patented land?" Pet. i.

withdrawn from homesteading exclusively "on account of" potash deposits, then an "oil and gas" reservation on that land is unlawful. Similarly, if the sole ground for withdrawal was petroleum deposits, then a reservation of "gas" is similarly unlawful, *unless the "gas" reservation refers only to fuel gases that typically accompany oil deposits. See* Pet. 16 n.9. The agency in this case explicitly found that in this record that there is "no evidence," Pet. App. 53a n.6, that petitioners' lands were withdrawn on account of CO2. Respondents thus face the following dilemma: either they can accept (more graciously than they have thus far) our concession that petroleum, and hence fuel gas, was a proper subject of reservation, or they can maintain that even the reservation of fuel gas was unlawful. But they cannot parlay the absence of evidence of CO2 withdrawals into an expansion of the permissible scope of the reservation. The "on account of which" language in the 1914 Act is a *limitation* on the government's power of reservation, not an authorization.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY LAWSON
357 E. Chicago Avenue
Chicago, Illinois 60611
(312) 503-0306

ROBERT H. BORK
Counsel of Record
1150 17th Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 862-5800

LUKE J. DANIELSON
GERSH & DANIELSON
1775 Sherman Street, Suite 1875
Denver, Colorado 80203
(303) 863-1115

STEPHEN H. MUSE
5919 Winding Ridge
San Antonio, Texas 78239
(512) 655-7559

Attorneys for Petitioners